

# THE JURIST

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## LEGAL SPRINTS\*

THE ancient Greeks gave us the Olympic Games. One of the features was the torch race, in which a relay of runners carried a lighted torch. You may recall that in the last Olympic Games, such a light was carried across Europe from Athens to London.

During the centuries legal thinking has run through various spaces of time. We may follow briefly the race of ideas, as it continued over the course of time, which we have chosen to divide into three laps.

### I—THE FIRST LAP

The first lap reviews the broad track of legal thinking from the very beginning of the sprint down to the entry of America into law. The historical spectator of this phase of the foot race would have noticed that each runner was convinced that the contest existed for a purpose, that each human being was tending towards a goal. All law from the ancient Code of Hammurabi and the Decalogue of Moses presumed the fundamental principle that man had a destiny, towards which he was running.

All human law was understood to be a set of rules regulating the conduct of each runner in his relationship with competitors and with the relay team. These regulations might

\* Sermon delivered October 17, 1950, by The Most Rev. Merlin J. Guilfoyle, D.D., Auxiliary Bishop of San Francisco, at the Red Mass sponsored by the St. Thomas More Society of Catholic Lawyers of San Francisco.

differ in various terrain or at different times of the race, but the basic purpose of the contest, the very race itself, was a standard course. The game was established by a Higher Power, a supreme Umpire who put the spiritualized feet of clay in the stadium of time.

It was accepted by all codes that the Maker of man had placed a natural law in the heart of each, a natural intellect which would direct him towards his destiny.

Human thought is perhaps best seen in the plays of a people, and so we find that all the Greek drama enacted in the outdoor theatre implied justice and retribution.

In the Greek play called *Antigone*, this heroine denies the right of a human legislator to change the divine law. She says boldly:

"You . . . who are mortal cannot change the infallible, unwritten, laws of Heaven. Not now nor yesterday did they begin, but they are everlasting, and none can tell the hour that saw their birth . . . I would not from fear of any man's edict, incur the God-inflicting penalty of disobeying divine law."

Latin thought followed the Greek, as Cicero wrote:

"There is a true law, right reason, natural, coextensive with the race of man, unchanging and eternal. It is not allowed us to make any alteration in that law; we may not take away any least portion of it; nor can we repeal it as a whole. Neither Senate nor people have power to release us from obligation in its regard.

"We shall not find one law at Rome, another at Athens; one now another hereafter; but that law, one, everlasting and immutable, is binding on all races and at all times; and there is one common master and head of all, God."

From the change of the calendar from B.C. to A.D. down until the first Fourth of July, 1776, spectators understood the purpose of the race in exactly the same way. Human legislators had at times changed the conditions of the track, different human equipment had been introduced, a change of

uniform, racing shoes, the cinders of the path, the sea of the arena—but all still understood the contest to be established by God, with the goal for each just behind the horizon of the spectators of this earth.

This natural conviction continued in law and in literature. Even as the Greek drama makes clear the natural convictions of Greek society, so the plays of Shakespeare tell of an English society which understood that man was to run his race, guided by the law of conscience. Thus Macbeth, the murderer, reflects:

But wherefore could I not pronounce "amen"?  
I had most need of blessing and amen  
Stuck in my throat.

Lady Macbeth walks in her sleep, because her conscience has diverted itself from the human purpose. Thus the doctor of human nature notes:

Unnatural deeds  
Do breed unnatural troubles: infected minds  
To their deaf pillows will discharge their secrets:  
More needs she the priest than the physician.

It is most clear from all sources of law, or literature, that the first lap of time, from the beginning until the discovery of America, showed that all law was to serve man in carrying out the fundamental purpose of his existence, following the divine law towards his goal.

## II—THE SECOND LAP

The second lap of historical legal thought we may call the Stars and Stripes. To find out the thought of the Founding Fathers of America, we can consult the concurrent career of three great statesmen—Alexander Hamilton, Thomas Jefferson and James Wilson.

Alexander Hamilton informs us that the strong federal government which he advocated was to defend natural rights.

He says: "Civil liberty is only natural liberty, modified and secured by the sanctions of civil society."

From Thomas Jefferson we have that well-worn but excellent statement that man has unalienable rights—life, liberty and the pursuit of happiness, endowed by the Creator. Jefferson has countless other statements.

"Can the liberties of the nation be thought secure, when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God?"

He says clearly that each man has his own place in the race of life and is not destined to be ridden like a donkey or horse.

"The mass of mankind has not been born with saddles on their back, nor a favored few booted and spurred, ready to ride them legitimately."

Jefferson was conscious of the value of the individual, of the destiny of each man as runner, albeit a social member of the team:

"If we are made in some degree for others, yet in a great part, are we made for ourselves. It were contrary to feeling, and indeed ridiculous to suppose that man has less rights in himself than one of his neighbors, or indeed than all of them put together. This would be slavery."

The third man of note was James Wilson, one of six men who signed both the Declaration of Independence and the Constitution. He very clearly states the relationship between the natural law and human legislation:

"To direct the more important part of our conduct, the bountiful Governor of the universe has been graciously pleased to provide us with a law—and to direct the less important parts of it, he has made us capable of providing a law for ourselves."

### III—THE THIRD LAP

The third lap in our review of legal thinking might be called from the Olympics to Olympus. Someone has chosen to write a book about Justice O. W. Holmes which is entitled

*Yankee from Olympus*. It is our contention that this justice of the Supreme Court, the idol of an agnostic age, shows how far legal thought has detoured from the purpose of life. Holmes is not important now, because he has long ago mingled with the cinders of the track, but his popularity with the jurists on the benches of the stadium indicates a sorry defection from human thought and from Americanism.

Countless thoughts of Justice Holmes are more evil than those expressed by Hitler who once walked out of the Olympic Games, because American negroes were breaking all the records. There are no more shocking legal statements anywhere than those of Justice Holmes:

"I am so skeptical as to our knowledge about goodness or badness of law, that I have no practical criterion except what the crowd wants."

"Just as far as the aid of public force is given a man, he has a legal right and this right is the same, whether his claim is founded on righteousness or iniquity."

It is difficult to choose from the countless statements of legal suicide, uttered by Holmes. But here is a statement which would kill all international law:

"Truth is the majority vote of that nation which can lick all the others."

Here we are, today, a group of men interested in law, honoring the saintly lawyer, Thomas More. Now if one could name the time in the legal course, when thinkers began to turn from the track into the forests of doubt and stupidity, he would say it was the moment when the head of Thomas More was severed from his body.

Thereafter, in slow but inevitable retrogression, this is what happened. Men began to admit the totalitarian power of the civil ruler, even in things spiritual, over the Vicar of Christ; they set up the Bible, or the written word alone, as the rule of life. In time they denied the Sacred Scripture and relied on human reason. They soon denied their own reason and set up the animal nature of man. They next

denied the dignity of man and his ability to reach any truth. This nihilism is the end of the road, to which Holmes and certain professors of law have led legal thinking. Holmes might have recalled words written by his own father, before he also showed signs of running amuck:

Build thee more stately mansions, O my soul,  
As the swift seasons roll!  
Leave thy low-vaulted past!  
Let each new temple, nobler than the last,  
Shut thee from heaven with a dome more vast,  
Till thou at length art free,  
Leaving thine outgrown shell by life's unresting sea!

May the Holy Spirit, to whom we pray today, grant us light on the road of life, that we may trace our steps back to the track, from which we digressed when St. Thomas More kept his legal head and was beheaded. This is the purpose of a Red Mass, a prayer to the Divine Fire, that we may run our relay well, while carrying the light of law:

Lead, kindly light, amid the encircling gloom,  
Lead Thou me on.  
The night is dark and I am far from home,  
Lead Thou me on.  
Keep Thou my feet, I do not ask to see the distant scene,  
One step enough for me.

## PERMISSION TO PARTIES INVALIDLY MARRIED TO LIVE AS BROTHER AND SISTER\*

### I. THE PROBLEM

ONE of the most encouraging phases of Catholic Action in this country is the program of vigorous activity in defense of the Divine Plan for marriage. The program, charted on the encyclical "Christian Marriage" of Pope Pius XI, is a tribute to the realistic leadership of our Bishops. They recognized the potential danger of the secularistic concept of marriage which gained popularity after the turn of the century, and in their pastoral, following the first World War, fired a broadside against the divorce evil. They branded it as a sign of moral decay and warned that it could develop into a national scandal. While decrying the devastating effects of divorce upon the religious and moral fibre of our civilization, they also set up a program of constructive action in defense of the sanctity of marriage and unity of the family.

This program, carried forward on a national scale through the Family Life Bureau of the National Catholic Welfare Conference, extends not only to the spiritual and supernatural aspects of marriage, but also to its natural and material aspects such as housing, wages, medical care, child welfare, pensions and other factors related to family security. The Bureau operates through channels of the radio, press, discussion clubs, and a variety of diocesan and parochial organizations. Its program is evident in pre- and post-marriage

\* Paper delivered by Very Rev. Msgr. John Król, J.C.D., on October 11, 1950, at the Twelfth Annual National Meeting of The Canon Law Society of America in New York City.

courses of instruction, special retreats for brides, for grooms and for married people, Cana Conferences, marriage clinics, domestic relations courts, and other forms of activity designed to promote the Christian concept of marriage in principle and in practice. The results of this intensive campaign are not subject to slide-rule measurements. However, it is not mere chance that relatively few Catholics have succumbed to the divorce disease which rages in near epidemic proportions in our country. The program has been effective and gives promise of increased fruitfulness in the future. It must be pursued relentlessly to counteract the pagan influence in our civilization.

We share a culture partly moulded by secularism and live in a society which has placed a stamp of approval on the practice of divorce. Approximately one out of every five people in this country is a Catholic. Since four out of every five persons choose marriage as their vocation, and one out of every four marriages ends in divorce, it is not surprising that, despite our best efforts, some Catholics resort to divorce and, subsequently, become embroiled in canonically bigamous unions. They enter such unions thoughtlessly, or after a struggle of conscience in which divine principles yield to human emotions. They try to justify their actions with specious arguments. They gave the Church a chance to witness their marriage. They feel that God understands and approves their action. They expend extraordinary effort to make their sinful union a success. They profess to enjoy great marital bliss, and incur new obligations. In the course of time, however, the disturbing voice of conscience becomes louder and more insistent, and they begin the long trek to God. Their first approach is invariably met with a demand for a complete separation. They become discouraged. They do not feel free to cast off the obligations incurred by the invalid union—obligations which bind in justice and which are enforceable at civil law. They cannot evict a sick and helpless spouse, revive the scandal of a bad marriage which has

been forgotten, or, by a separation, advertise the hitherto little known invalidity of the marriage. In some cases, there is a possibility of validation by way of a Petrine or Pauline Privilege, but again the problem of baptizing a person, who lives in a sinful union, looms as an obstacle. Such people often intensify the practice of their faith. They attend Mass and devotions frequently. They make countless novenas and pilgrimages. They are strays who found themselves, and who come begging for readmission to the fold.

The program in defense of the sanctity of marriage and security of the family has, just as any other program of action within the Church, the one ultimate objective of promoting the salvation of souls. The program is a means to an end and not an end in itself. Since it is not completely successful in attaining its objectives, it must be complemented with a curative program. As good shepherds, we cannot be complacent about the ninety-nine sheep within the fold. We must return the stray to its fold. We must show due concern for those, who albeit through their own recklessness, become matrimonial casualties and are in danger of losing their soul. We cannot ignore their spiritual needs, any more than we can ignore the needs of the autoist who lies unconscious along the road—a victim of his own reckless driving.

The curative program, in behalf of invalidly married couples, presents a problem which concerns not only the individuals concerned, but also the community. In pursuing its Divine Mission, the Church must promote the salvation of each and every soul; but it must also avoid anything that might encourage others to risk the salvation of their soul. It must operate within the framework of the principles that scandal must be avoided, that the good of the community supersedes the good of the individual, and that there can be no toleration of a situation which exposes a person to the danger of losing his soul. The delicate and serious nature of this problem is well appreciated in theory and in practice. Canonists and theologians uniformly warn that the brother-

sister permission is a dangerous thing (*res plena periculis*), and should practically never (*fere numquam*) be granted. As a result, there is a tendency among those in the active ministry to regard the brother-sister as something highly impractical. This approach is indeed a safe one, but it can be carried to unwarranted extremes. The fact is that the brother-sister arrangement is available as a practical solution in some cases. Since we are dedicated to the cause of saving souls, we must employ every lawful means of promoting this cause.

The subject of brother-sister permissions is not a novel one; however, the current flood of divorces and remarriages has multiplied the number of requests for such permissions. The subject is of urgent importance, not only to Chancery officials, but also to parish priests and to confessors. The literature on the practical principles and procedure in handling such cases is very meager. Much has been written in a controversial vein concerning the subject of the occasion of sin, but theologians disagree on terminology and on the formulation of practical principles. There also seems to be a conspiracy of silence on the methods employed in processing such petitions in different dioceses.

I accepted the invitation to pioneer a discussion on this subject with no delusions. It is not my ambition to give an exhaustive treatise on all the related principles, or to offer an easy practical solution for all cases. My purpose will be accomplished by stimulating or provoking a constructive discussion, and the formulation of some practical rules of procedure in dealing with such cases. Canon Law and Moral Theology are practical sciences, and the principles of these sciences must be applied, without compromise, to the practical problems which face us.

## II. PRINCIPLES INVOLVED

### REMEDIES FOR AN INVALID MARRIAGE

There are five possible approaches to the problem of an invalid marriage. The first is validation by renewal of consent, or in extraordinary circumstances, by a sanation. The second, available only when the incurable nullity of a putative marriage is unknown to both parties, is to allow the couple to remain in good faith. The third, which is the normal approach to an incurably null marriage, is to enjoin a complete separation and an annulment. The fourth is to explore the reasonable hope of a validation by way of an annulment or a dissolution of a prior marriage. The fifth, a measure of last resort, is to allow the couple to live as brother and sister.

The first remedy, generally, presents no grave difficulty since it can be applied with a minimum of delay. In any case, the couple must be enjoined to effect at least a partial separation—*quoad torum*—until after the validation ceremony. The second and the third approach have no practical bearing on the subject of this discussion. The last two approaches are of practical interest, since they involve a temporary or a permanent brother-sister arrangement.

### VALIDATION BY WAY OF PAULINE OR PETRINE PRIVILEGE

A temporary brother-sister arrangement is practically inevitable in certain Pauline and Petrine Privilege cases. This is evident from the following example:

Saul, a non-Catholic, divorced his non-Catholic wife and attempted marriage with Magdalene, a Catholic spinster. He desires to become a Catholic and to have his marriage validated. He submits convincing proof of his non-baptism, receives instructions and asks to be baptized. Because of minor children, lack of funds and the danger of exposing the invalidity of his marriage to unsuspecting neighbors and friends, he refuses to separate from Magdalene. Unless he is baptized, he cannot qualify for the Pauline, and generally not for the Petrine Privilege. The pastor prudently hesitates to bap-

tize Saul, who apparently is living in a proximate occasion of sin.

The Pauline Privilege is certainly not available to catechumens, but only to those who are converted and baptized. This is evident from a response of the Sacred Congregation of the Propagation of the Faith given on January 16, 1803.<sup>1</sup> Canon 1121, § 1 states that baptism should precede the interpellations. Permissions have been granted, for grave reasons, to invert this order. Normally, however, baptism of the petitioner is a prerequisite for the completion of the case.

The Norms issued by the Holy Office on May 1, 1934, which serve as a guide in Petrine Privilege processes, require information concerning the time and motives which induced the petitioner to be baptized—“*ad baptismum suscipiendum*.” They do not specifically demand that the decision to submit to baptism be actualized before the process is completed. Nevertheless, it seems to be a general and a reasonable practice of matrimonial tribunals to demand conversion, through baptism, before certifying the sincerity of conversion and to require that the petitioner embrace the Faith, before his petition in Favor of the Faith is recommended.

Since in one case baptism is required by law, and in the other, by common practice, the one hope for completing a Pauline or Petrine Privilege case and validating the marriage is the baptism of the petitioner. It is reasonably assumed that people in bad marriages live in a proximate occasion of sin. Since the Sacraments must be denied to those who refuse to avoid a voluntary proximate occasion of sin, the only hope for baptism is in cases in which the occasion of sin is neither voluntary nor proximate.

#### BAPTISM OF AN INVALIDLY MARRIED PERSON

A proposition, condemned by Innocent XI, makes it clear that the sacraments must be denied to a person who refuses

<sup>1</sup> *Codici Iuris Canonici Fontes* cura Eñi Petri Card. Gasparri editi (9 vols., Romae [postea Civitate Vaticana]: Typis Polyglottis Vaticanis, 1923-1939 [Vols. VII-IX ed. cura et studio Eñi Iustini Card. Serédi]), n. 4671.

to avoid a voluntary proximate occasion of sin.<sup>2</sup> One of the conditions required by Canon 752, n. 1, for the lawful reception of baptism is contrition, or at least attrition for all mortal sins. In defining contrition as "A sorrow and detestation for sin committed, with a purpose of sinning no more," the Council of Trent made it clear that the firm purpose of avoiding sin in the future is an indispensable requisite for contrition.<sup>3</sup> Theologians uniformly agree that the firm purpose of avoiding sin must extend to the avoidance of the proximate occasion of sin. There are two schools of thought on the question of what constitutes a proximate occasion of sin, and its corollary of determining the gravity of the obligation of avoiding the single occasion of sin.<sup>4</sup> The exponents of both schools of thought agree that one has a serious obligation of giving up the habit of frequenting the voluntary occasion of sin in which he often sins mortally.<sup>5</sup> On this point Ayrinhac writes: "Real attrition would not exist in a catechumen who would not manifest willingness to obey all the laws of God and of the Church, to give up superstitious practices, dis-

<sup>2</sup> Condemned Proposition, r. 61, "Potest aliquando absolvi, qui in proxima occasione versatur quam potest et non vult deserere, quin imo directe et ex proposito quaerit aut ei se ingerit."—Denzinger-Bannwart-Umberg, *Enchiridion Symbolorum Definitionum, et Declarationum de Rebus Fidei et Morum* (14.-15. ed., Friburgi Brisgoviae: Herder & Co., 1922), no. 1212.

<sup>3</sup> Conc. Trident., sess XIV, *de poenitentia*, c. 4, can. 5.

<sup>4</sup> Napholc, P., "De Vera Proximae Occasionis Peccati Notione," *Periodica*, XXI (1932), 1-34, 129-157; Fabregas, "De Obligatione Vitandi Probabile Periculum Peccandi," *Periodica*, XXX (1941), 20-45; Regan, "The Proximate Occasion of Sin According to St. Alphonsus," *The Australasian Catholic Record*, XXVI (1945), 97-109; Kelly, "Notes on Moral Theology," *Theological Studies*, XI (1950), 64, 65.

<sup>5</sup> Kelly, *op. cit.*, p. 65; Genicot Salsmans, *Institutiones Theologiae Moralis* (11. ed., 2 vols., Bruxellis: A. Dewit, 1927), II, 330; Merkelbach, *Summa Theologiae Moralis* (3. ed., 3 vols., Desclée, 1939), III, n. 667; Prümmer, *Manuale Theologiae Moralis* (8. ed., 3 vols., Friburgi Brisgoviae: Herder, 1936), III, n. 451; Vermeersch, *Theologiae Moralis Principia, Responsa, Consilia* (2. ed., 4 vols., Romae: Universit  Gregoriana, 1926-1928), III, n. 542; Aertnys-Damen, *Theologia Moralis* (14. ed., 2 vols., Taurini: Marietti, 1944), II, n. 476.

miss an illegitimate wife, etc. . . ."<sup>6</sup> The same idea was expressed by the Holy Office in response to a question whether an adult pagan who was near death could be baptized if he merely promised to retain but one of his many wives if he recovered. The Holy Office declared that he would have to dismiss all but his one lawful wife before he could be baptized.<sup>7</sup> We cannot disregard the serious import of this response. The question concerned a dying pagan adult and his request for the sacrament of baptism, which is necessary for salvation. The only logical inference is that the Holy Office regarded such a circumstance as a voluntary proximate occasion of sin, which would have to be removed under pain of being refused the sacraments.

In view of the foregoing, it is easy to appreciate the problem created by a catechumen who refuses to separate from his unlawful wife. In these circumstances, the only available solution—the only possible adjustment without compromise of principles—is the brother-sister arrangement. This solution is possible only, in a particular case, if the apparent proximate occasion of sin is actually a remote one, and at the same time, there is no danger of scandal.

<sup>6</sup> *Legislation of the Sacraments in the New Code of Canon Law* (London, New York: Longmans, Green & Co., 1928), p. 30.

<sup>7</sup> S.C.S. Off. (Quebec) 10 maii 1703—*Fontes*, n. 765:

6. "Utrum baptizari possit barbarus adultus morti proximus, qui plures secum habens mulieres, pollicetur se nonnisi unam servaturum, si pristinae sanitati restituatur, sed qui dimittere non vult alias; an teneatur missionarius compellere, et insistere ut barbarus dicat quam ex omnibus foeminam electurus sit in coniugem, vel utrum sufficiat barbarum promittere se nonnisi unam habiturum.
- R. Ad. 6: Non licere, si ex illis mulieribus una sit uxor legitima et ceterae concubinae, nisi prius eiectis concubinis; si vero habuerit omnes tamquam legitimas uxores, pariter non licere, nisi eiectis omnibus praeter primam, si cum ea valide contraxit, et velit secum cohabitare absque Creatoris iniuria. Si tandem vel omnes simul et unico actu acceperit in uxores vel omnes habeat ut concubinas, non licere, nisi eiectis omnibus ante susceptionem Baptismi."

# OCCASION OF SIN

A thorough understanding of the principles, involved in a brother-sister arrangement, presupposes a knowledge of the nature and different types of occasions of sin.

An occasion of sin is generally defined as some external circumstance—a person or object—which attracts to, and affords a facility for sin. The occasion is something external, and is not to be identified with the internal propensity arising from human frailty, inordinate passions, evil habits and the like.<sup>8</sup> Some authors define the occasion of sin as an external circumstance which induces the danger of sin—*periculum peccandi*.<sup>9</sup> While this definition is advanced by authors who espouse the traditionally stricter outlook on the occasion of sin; for the purpose of the brother-sister arrangement, this definition is more convenient. Applying this definition to an invalidly married couple, who because of advanced age and illness have lived in continence for some time, we could conclude that they are not living in the occasion of sin. In this case, the internal propensities would be absent. Thus Naphole, for example, insists that both the external and internal elements are essential components of an occasion of sin, and there is no occasion unless both are present.<sup>10</sup>

An occasion of sin may be continuous, e.g., cohabitation in an invalid union, or disjunctive, when the occasion occurs at intervals.

An occasion of sin can be remote or proximate. A remote occasion is one which presents but a slight danger of sinning—in which a person rarely sins. Such occasions exist universally, and they neither can nor must be avoided. The definition of a proximate occasion of sin is a subject of contro-

<sup>8</sup> Prümmer (*op. cit.*, III, n. 449): "Ergo occasio peccandi non est passio inordinata vel fragilitas poenitentis, cum ista sint quid intrinsecum."

<sup>9</sup> Naphole (*op. cit.*, pp. 150, 151): "Occasio, prout hic sumitur, est circumstantia homini exterior quae periculum peccandi inducit." Cf. also, Aertnys-Damen, *op. cit.*, II, n. 468; Merkelbach, *op. cit.*, III, n. 663.

<sup>10</sup> *Op. cit.*, p. 151: "Hinc duabus ex partibus essentia occasionis componitur. Potest in maiore gradu adesse unum vel alterum, sed utrumque necessario adesse debet."

versy. Many theologians defend St. Alphonsus' definition of the proximate occasion of sin. He considered the proximate occasion of sin as something external to a person—whether it be another person, or some place or thing—which places him in grave danger or serious probability of sinning mortally; even though it is also probable that in spite of the occasion, sin will be avoided.<sup>11</sup> Another group of theologians advance a more liberal view of the proximate occasion of sin, by restricting it to one in which a person rarely, if ever, abstains from serious sin. They maintain with Lugo that a proximate occasion of sin is one in which a person sins always—“*semper*” or at least most frequently—“*omnino frequentius*.”<sup>12</sup> Thus, the school of St. Alphonsus holds that the proximate occasion of sin is present when the danger of sinning is truly probable; even though it is equally probable that in spite of the occasion, sin will be avoided. The school of Lugo and Genicot holds that the proximate occasion of sin is one in which a person always or almost always sins. As a result of the difference of opinion on the meaning of the proximate occasion of sin, the school of St. Alphonsus, following the axiom “*idem est in moralibus facere et exponere se periculo faciendi*”, concludes that even the single occasion of sin must be avoided *sub gravi*, provided the danger of sinning mortally is solidly probable. The school of Lugo and Genicot maintains that there is not a serious obligation of avoiding the single occasion, unless the danger of sin is so great as to amount to a moral certainty—as would be had when a situation always or almost always leads one into mortal sin.

While this controversy is of greatest interest to a confessor dealing with the single occasion of sin, we can, in this discussion, completely prescind from it. Our problem is not the single occasion of sin, but a continuous occasion to which a couple in an invalid marriage are exposed. There is no controversy on this point. Even the exponents of the more leni-

<sup>11</sup> Cf. Regan, *op. cit.*, p. 98; Ter Haar, *De Occasionariis et Recidivis*, (ed. alt., 1939), p. 6.

<sup>12</sup> Genicot-Salsmans, *op. cit.*, II, n. 371. Cf. also Fabregas, *loc. cit.*

ent view agree that one has a serious obligation of giving up the habit of frequenting a voluntary occasion in which he often sins mortally.<sup>13</sup> For practical purposes, and particularly to avoid any confusion that might arise from the controversy regarding the single occasion, we must take for granted that as long as the invalidly married couple are in a voluntary proximate occasion of sin, they have no choice except to effect a complete separation.

A proximate occasion is free or voluntary if it can easily be avoided; otherwise it is considered a necessary occasion. The latter can be physically or morally necessary. Physical necessity is verified in the case of a prisoner or soldier who is not free to remove himself from the occasion. The same is true of a lawful wife, who is exposed to the danger of sin by living with her husband. A morally necessary proximate occasion is one that can be avoided, but not without grave difficulty and great harm. Authors generally consider company keeping, with the prospects of an early marriage, as a necessary proximate occasion of sin.

From the foregoing, we can, for the purposes of this discussion, deduce the following practical principles:

1. It is absolutely necessary to avoid any occasion of sin which, in a particular case, is tantamount to sin. If the occasion constitutes a proximate danger to eternal salvation, then, in accordance with the words of Our Lord concerning the plucking out of the eye and the cutting off of the hand (Matt. 5: 29), it must be abandoned even at the risk of one's life.<sup>14</sup>

<sup>13</sup> Kelly, *op. cit.*, p. 65; Genicot-Salsmans (*op. cit.*, II, n. 372): "Sic ponamus iuvenem, qui crebro peccavit cum amasia, saepe etiam eam adire quin graviter contra castitatem delinquat: hunc censemus sub gravi teneri ad abrumpendam hanc consuetudinem, in qua pergere nequit sine morali certitudine novorum lapsuum. . . ."

<sup>14</sup> Ter Haar (*Casus Conscientiae* [3. ed., 1944], I, 62): "Poenitens, qui in occasione moraliter necessaria, adhibitis etiam remediis, eodem fere modo semper relabitur, ita ut probabilis spes eius emendationis iam non supersit, hanc occasionem physice relinquere debet, etiam cum gravissimo suo incommodo aut damno."

2. It is neither possible nor necessary to avoid a remote occasion of sin. Such occasions exist everywhere for everyone in this world.
3. A voluntary proximate occasion of sin must be avoided under pain of denial of the sacraments. This is evident from the propositions condemned by Innocent XI.<sup>15</sup>
4. Physically necessary proximate occasions of sin cannot be avoided. They must, however, be turned into remote occasions by vigilance and by the use of natural and supernatural aids.
5. It is lawful to expose oneself to a morally necessary proximate occasion of sin, provided there is a firm and sincere willingness to use the means prescribed to make the materially proximate occasion formally remote.<sup>16</sup>

It must be emphasized that while some theologians defend what is regarded as a rigorous definition of a proximate occasion, they, as well as the defenders of the lenient definition, agree that there are occasions of sin which, though normally to be avoided, can be lawfully frequented if such frequentation is morally or physically necessary. Such, in fact, was the view of St. Alphonsus.<sup>17</sup>

It is of particular importance to appreciate precisely what, in the opinion of theologians, constitutes a necessary proximate occasion of sin. Ter Haar, who defends the view of St. Alphonsus, provides us with an excellent example.<sup>18</sup> He pre-

<sup>15</sup> Denzinger-Bannwart-Umberg, *Enchiridion*, n. 1212-1213:

61. "Potest aliquando absolvi, qui in proxima occasione peccandi versatur quam potest et non vult omittere, quin imo directe et ex proposito quaerit, aut ei se ingerit."
62. "Proxima occasio peccandi non est fugienda, quando causa aliqua utilis aut honesta non fugiendi occurrit."
63. "Licitum est quaerere directe occasionem proximam peccandi pro bono spirituali vel temporali nostro vel proximi."

<sup>16</sup> Prümmer, *op. cit.*, III, n. 450.

<sup>17</sup> Regan, *op. cit.*, p. 107; Ter Haar, *De Occasionariis et Recidivis*, p. 116.

<sup>18</sup> Ter Haar, *Casus Conscientiae*, I, n. 158.

sents the case of a couple in an incurably invalid union. The solution which he proposes is:

. . . omnino insistendum est separationi physicae, nisi cohabitatio et occasio proxima sit vere necessaria. Haec necessitas adesse potest, v.g.: a) si complices iam inierunt matrimonium civile quod rumpi nequeat; b) si iam nati sunt infantes quorum educationi provideri debeat; c) si cui ex separatione damnum valde vel gravis infamia oriatur, haec tamen ratio non facile admittatur, utpote saepe ob passionem exaggerata; d) 'si femina inquit S. Alphonsus, nequiret manuum labore se alere, aut in aliqua domo servire, aut mendicare sine dedecore aut aliquo gravi incommodo' (III, 437): in hoc autem casu femina saepe in aliquo instituto locari potest.

3. Si neque matrimonium, neque separatio physica fieri potest, alia remedia efficacia sunt praescribenda, quibus periculum peccandi e proximo reddatur remotum; de hisce vide Opus, n. 142. Imprimis nitendum est, ut is separatis lectis vel etiam cubiculis dormiant, ut a signis specialis amoris omnino se abstineant, imo etiam ut solum cum sola esse, quantum possint evitent.

It is rather evident that even the less lenient views of the theologians, who follow St. Alphonsus, make due allowance for the possibility of brother-sister arrangements. The very example proposed by Ter Haar can serve as a guide for determining whether, in a particular case, the proximate occasion is voluntary or necessary.

#### INTERNAL AND EXTERNAL FORUM

The granting of permission to live as brother and sister is not reserved exclusively to either the external or the internal forum. This fact is so obvious in theory and in practice that it is not open to controversy. In the external forum, the Ordinary is the final authority in all cases involving the spiritual welfare of the community, and the danger of scandal. Canon 2356 outlines the procedure to be followed by the Ordinary in dealing with bigamists. In the internal forum, the confessor

is competent to judge the disposition of his penitent, and he may know that in a particular case, a materially proximate occasion of sin is formally remote, or factually non-existent. On this matter Vlamming simply states: "Super quo iudicium in foro externo sit Ordinario, et in foro interno confessario."<sup>19</sup>

While the competence of the confessor cannot be gainsaid, it is particularly true of the internal forum that the brother-sister permission is a "res plena periculis, ideoque fere numquam permittenda."<sup>20</sup> The confessor cannot excuse false charity or laxity in such matters by appealing to the dictum: "sacramenta propter homines," for as Ter Haar notes: "... sacramenta a Christo instituta sunt propter homines, ut hi eorum susceptione a praeteritis peccatis liberentur, a futuris praevertantur et sic salventur, minime vero ut laxa eorum nimisque profusa collatione pravis moribus indulgeatur et sic homines damnentur."<sup>21</sup> The confessor must be guided by the warning of St. Charles Borromeo, which has been frequently repeated by the Holy See; "ex magna absolvendi facilitate, magnam peccandi facilitatem oriri necessario debere."<sup>22</sup> Due consideration must be given to the preeminence of the spiritual good of the community.<sup>23</sup> Since the private good of the penitent must yield to the common good, the confessor must preclude scandal and safeguard the spiritual good of the community, even in such urgent cases in which the refusal of absolution would expose the penitent to the risk of grave infamy.<sup>24</sup> Moreover, in dealing with penitents who repeatedly

<sup>19</sup> *Praelectiones Iuris Matrimonii ad Normam Codicis Iuris Canonici*, II (3. ed., Bussum: Paul Brand, 1921), n. 757.

<sup>20</sup> Cappello, *Tractatus Canonico-Moralis de Sacramentis*, III, *De Matrimonio* (4. ed., Taurinorum Augustae: Marietti, 1939), III, n. 841, 3.

<sup>21</sup> *De Occasionariis et Recidivis*, p. 413.

<sup>22</sup> S.C. de Prop. Fide, instr. aug. 1827—*Fontes*, n. 4740. Benedictus XIV, Apostolica Constitutio, 26 iun. 1749, n. 22—*Fontes*, n. 400.

<sup>23</sup> Ter Haar (*op. cit.*, p. 424): "Etenim, ut aliorum sacramentorum ministri, ita confessarius ad bonum quoque publicum spectare debet."

<sup>24</sup> Ter Haar (*op. cit.*, p. 81): "... confessarius debet anteponere bonum spirituale communitatis bono privato sui poenitentis; bonum autem commune damnum pateretur, si scandalum dantes non admonerentur, et ad sacramenta admitterentur."

succumbed to the same proximate occasion of sin, the confessor cannot invariably extend the dictum "Poenitenti credendum est, sive pro se sive contra se loquenti" to the penitent's assurances of sufficient disposition.<sup>25</sup> The penitent can easily err in judging the sufficiency of his own disposition.<sup>26</sup> The role of a penitent is that of a witness and not of a judge. The confessor alone is the judge of the penitent's disposition. He is not bound to follow the judgment of the penitent.<sup>27</sup> It should be remembered also, that many penitents, in their anxiety to be readmitted to the sacraments, make promises very freely, but after being absolved, lose some of their fervor.<sup>28</sup>

While the competence of the confessor in such cases cannot be questioned, he is not always in a position to ascertain all that needs to be ascertained. Frequently enough, the penitent may in good faith believe that the invalidity of his marriage is not publicly known; whereas in reality it may be a subject of current gossip which is discreetly kept from his ears. The penitent may have been responsible for the break-up of the former marriage, and the granting of such a permission to him would be regarded as the placing of a premium on his vice. The confessor may be sure of the disposition of his penitent, but he has no way of ascertaining the willingness

<sup>25</sup> Genicot-Salsmans (*Institutiones Theologiae Moralis*, II, n. 370): "Fieri quandoque potest ut recidivo . . . confessarii prudenter iam credere nequeant, quamvis se dolere dicat."

<sup>26</sup> Ter Haar (*op. cit.*, p. 312): "Ipse poenitens facile falli potest circa suas dispositiones de quibus solus confessarius est iudex."

<sup>27</sup> Ter Haar (*op. cit.*, p. 245): "... doctrina illa quae tenet, confessario semper poenitentis assertioni circa hujus dispositionem habendam esse fidem, nobis videtur falsa et naturae sacramenti Poenitentiae contraria, tum qui inversionem induceret ordinis iudicialis, tum etiam quia sacerdotem, dei in hoc tribunali ministrum, gravi exponeret periculo ferendi sententiam falsam et absolvendi in terris reum, quem Deus in coelis non absolvit."

<sup>28</sup> Ter Haar (*Casus Conscientiae*, I, p. 59): "Multi enim poenitentes in ipso actu confessionis faciles quidem sunt in promittendo se illa media adhibituros; sed semel absoluti tardi et segnes sunt in exsequendo, quasi obliviscentes quae promiserant."

of the other party to forego without a struggle all physical relations. In view of these difficulties, the confessor should be guided by the advice of eminent canonists and moralists that permission to live as brother and sister is a very dangerous thing and should practically never be granted.

The Ordinary is responsible for the avoidance of scandal and for promoting the spiritual welfare of the community. He is in the best position to employ a variety of means to determine the danger of scandal in a particular case, and to judge the disposition of both parties. In this discussion, we shall limit ourselves to the practical procedure involved in handling such cases in the external forum.

### III. PRACTICAL PROCEDURE

Any attempt to formulate rules of practical procedure in handling brother-sister petitions must be premised on the following principles:

1. There can be no permission or even toleration of an occasion of sin which exposes a person to the proximate danger of losing his immortal soul.
2. The brother-sister arrangement is not an alternative, but only a last resort solution.
3. This solution cannot be employed unless it is evident that the proximate occasion is necessary, and there is reasonable hope that it can be made formally remote.
4. Any danger of serious scandal eliminates the availability of a brother-sister permission. This point is imperatively important because scandal in such matters would readily encourage others to be reckless in marriage; it would lend authority to an increasingly popular fallacy that marriage is a private matter and, as such, has no bearing on religion or salvation, and finally, it would give the impression that the Church is compromising the teaching of Christ regarding marriage.

These principles can be used as a guide for investigating petitions for permission to live as brother and sister. They can serve the parish priest who makes the first contact and also the Ordinary, who is responsible for the final decision. These principles could be proposed in the form of questions:

1. IS ANY OTHER REMEDY AVAILABLE?

The answer to this question would rule out marriages which can be validated by renewal of consent or by sanation. If there are serious doubts about the validity of the previous marriage, or about its dissolution by the alleged death of a previous spouse, the case would have to be referred to the Matrimonial Tribunal. This would also be true if there were reasonable hope of validation by way of a Pauline or Petrine Privilege. The Tribunal would then relay any pertinent information about the parties to the Ordinary if a petition for a brother-sister permission was inevitable. Cases may occur when neither party was previously married; but because of serious illness there is reason to question the capacity of a person to contract a valid marriage, e.g. supervening impotency. In such cases, a brother-sister arrangement may be the only reasonable solution.

2. IS SEPARATION IMPOSSIBLE?

The reasons for not separating must be compelling. Authors indicate the following as typical reasons: welfare of minor children which cannot otherwise be secured; financial inability to maintain separate living quarters; danger of disclosing the invalidity of a marriage that is regarded as valid; hope of eventual validation by way of a favorable decision in a matrimonial case; incurable and lingering disease of one of the parties, etc. These and other reasons may serve to prove that the proximate occasion is a necessary one.

3. IS THERE DANGER OF SCANDAL?

It should be presumed that every brother-sister case is a potential source of scandal. Unless the presumption is

countervailed by contrary evidence, the permission should not be granted. An invalid marriage is generally a matter of public record, but it may not be a matter of public knowledge. The very mention of the word "public" brings up the familiar discussion on whether the norm of canon 1037 or 2197 should be applied. Scandal arises not from records in archives, but from the knowledge of the people. If, therefore, the fact of the invalidity is not known, and there is no danger of it being disclosed, the petition can be given consideration. Often the fact of the invalidity is known, but is incorrectly ascribed to defect of canonical form. In such cases, the reception of the sacraments, after a brother-sister permission, would be popularly regarded as a sign of validation, and thus scandal would be avoided.

The danger of scandal should not be underestimated; neither should it be exaggerated. The remarriage of a Catholic after a divorce normally is, and should be, a source of scandal. We cannot, however, ignore the fact that our society accepts divorce as a part of everyday life. In a small town or village, a divorce creates a sensation. In a large city, only a very small percentage of divorce cases rate a notice in the newspapers. Our courts are grinding out divorces at an incredible rate of speed. A prominent judge, who operates but one of a number of the divorce courts in a large city, boasted of his record of efficiency as a public servant. He had granted 84 divorces in less than two hours. This wholesale turnover, coupled with the fact that many people involved in divorces make every effort to conceal their divorce and remarriage, explains why in a particular case there may be no danger of scandal. This is particularly true in our large cities, where a person can practically cover all traces of the past by moving into a new neighborhood or into a suburb. This is not a conjecture, but a reality based on experience of many in the active ministry. In some cases, even the parish priest does not suspect that his happily married parishioners, who are very faithful to their religious obligations, were invalidly married and were not receiving the sacraments. It is advisable in de-

termining the presence or absence of scandal to consult not only the proper pastor, but also the pastors of the parishes where the couple lived at the time of the separation, divorce and remarriage. In nearly every case there will be at least some slight danger of scandal, but this can at times be precluded, e.g., by directing the persons to receive the sacraments only in churches where the status of their marriage is not known.<sup>29</sup>

#### 4. IS THERE DANGER OF INCONTINENCE?

There is no conclusive standard for determining the presence or absence of the danger of incontinence. As a rule, people do not apply for such a permission unless they are determined to avoid such danger, and often, after they have convinced themselves that they are capable of keeping the promise to live as brother and sister. In any case, consideration should be given to the age of the parties, the condition of their health, their sincerity and extraordinary virtue, and their experience in making a materially proximate occasion of sin formally remote. Due care should be exercised in seeking information on this delicate matter. The party should not be compelled to disclose matters of conscience outside of the confessional. However, such a general question as: "Why are you convinced that you can keep a promise to live as brother and sister"? will generally evoke assurances that the conviction is based on past performance. If such spontaneous assurances are not forthcoming, it may be advisable to direct the parties to convince themselves that they are capable of keeping the promise, before requesting permission to live as brother and sister.<sup>30</sup>

The purpose of this discussion is to suggest a practical method of procedure in handling brother-sister cases. To

<sup>29</sup> Ter Haar, *Casus Conscientiae*, I, 167.

<sup>30</sup> Ter Haar (*loc. cit.*): "Si in concubinato publico occasio est necessaria, absolutio concedenda non est, nisi, . . . b) iam per notabile tempus adhibitis remediis se a peccato continuerint." Cf. also p. 168: "Ita S. Alphonsus: Eo casu dico omnino expedire, quod saltem differatur absolutio, donec experimento probetur continentia poenitentis."

avoid excessive theorizing, I take the liberty of presenting a method which was developed and has proved satisfactory in the Diocese of Cleveland. This method invariably calls for the co-operation of the parish priest, and in some cases, of the Diocesan Tribunal. The petitions are submitted to the Most Reverend Ordinary, who acts as the sole judge and authority in all such cases.

Whenever a case occurs, the parish priest requests a Brother-Sister form from the Chancery. The form is a combined questionnaire and petition (cf. below for a copy of the questionnaire). It also contains instructions to the priest and the promises which are to be signed by the petitioners. The form starts with the following instructions to the priest:

N.B. This petition may be used ONLY if (1) validation is IMPOSSIBLE, (2) separation is EXTREMELY difficult, (3) there is no danger of SCANDAL, and (4) danger of incontinency is precluded by the advanced AGE or GRAVE ILLNESS of the parties.

Each petition should be accompanied by a letter commenting on the above points and presenting all the arguments in favor as well as against the granting of the petition.

The parties are interviewed separately and alone. Identical questions are proposed to both. The questions are designed to bring out information about the past marriage and the present invalid union; about the time of residence in the locality; the reasons for not separating; the nature of their illness; the number of persons, Catholic as well as non-Catholic, who are aware of the invalidity of the marriage; the number of persons who know that the marriage cannot be validated, and who know why it cannot be validated; the cause of the divorce and some information about the previous spouse. The answers to all the questions on the petition generally supply complete information on the danger of scandal and incontinence and on the reasons for not separating.

The questionnaire has proved satisfactory. The parish priests know precisely what is expected, and under what con-

ditions a petition will be given favorable consideration. They are encouraged in their work of searching out the sheep that strayed from the fold. They know when they can extend a reasonable hope for a favorable decision without repeated consultation with the Bishop's Office.

The problem of handling the petitions of those who have hopes of validating their marriage by way of a Pauline or Petrine Privilege requires additional precautions. Generally, such petitioners are neither advanced in years, nor suffer from any grave illness. Sometimes their hopes for a favorable decision from the Tribunal are premature and groundless. Their attempted marriage argues against their ability to control the passions which led them to risk the salvation of their souls in an invalid marriage. In order to obtain added assurances of their sincerity and of the reasonableness of their hopes for a favorable decision, their petitions must carry the endorsement of the Diocesan Tribunal.

In this type of case, the parish priest inquires into the possibility of a Pauline or Petrine Privilege. He encourages the non-Catholic to take instructions in the faith and insists that the Catholic party attend the same instructions. In the course of instructions, the priests lays particular stress on the necessity of avoiding sin. When the instructions are nearly completed and the priest is convinced of the sincere desire for conversion, the case is referred to the Diocesan Tribunal. The Tribunal will pay particular attention to the sincerity of the parties and their willingness to live in accordance with the laws of God. The Tribunal will then recommend a petition for permission to live as brother and sister. The permission in such cases is granted only on a temporary basis, i.e., until a final decision is made in the case. An idea of the procedure followed by the Tribunal can be gained from an excerpt of a letter of instructions, issued by His Excellency, Bishop Hoban, to the Officialis of the Tribunal. The instruction is primarily concerned with Mixed Marriages that can possibly be validated by way of a Pauline or Petrine Privilege. In these cases the question of baptizing a person, who is in a

proximate occasion of sin, must be faced. The instructions given in the letter are:

1. All such cases will, in the first instance be referred directly to the Tribunal which will invariably direct the parties to effect a complete separation.
2. If the parties claim that a complete separation is impossible, the Tribunal will insist on a partial separation—*quoad torum*—and will investigate whether the reasons for not separating truly exist and are compelling.
3. The Tribunal will submit and recommend a Brother-Sister Petition only when it is ascertained that:
  - a. the reasons for not separating completely exist and are compelling.
  - b. the danger of scandal is absent or at least certainly remote.
  - c. the hope for a favorable decision is solidly probable.
  - d. the extraordinary sincerity and virtue of the parties, augurs well for their observance of total continence.
  - e. the experience of the couple from the time of their first contact with the Tribunal, confirms their willingness and ability to live as brother and sister.
4. As a general rule, petitions are not to be submitted for a couple who in bad faith attempted an invalid marriage, after contacting the Tribunal.
5. Since the danger of scandal is immeasurably greater when both parties of an invalid marriage are Catholics of long standing, the possibility of granting Brother-Sister permissions to such people will be most rare.
6. Permission to live as brother and sister, in favor of a couple who has a case at the Tribunal, will be limited to the final conclusion of their case. When, therefore, a case is abandoned or given a favorable decision, the Tribunal will inform the parties that the Brother-Sister permission has expired, and will notify the Chancery that the case has been concluded.

When all requisite information has been obtained, each party, in the presence of the other and that of the priest, makes the following promises under oath:

Realizing fully the sacredness of an oath, and my obligation before God, touching the Holy Gospels, I solemnly swear:

1. that under no circumstances will I ever attempt to live as husband and wife with my present consort.
2. that if I violate this promise, I will not attempt to receive the Sacraments until I have separated, or referred the matter to the Bishop.
3. that I will receive the Sacraments of Communion only in Churches where my marital status is not known to the parishioners.
4. that I will explain my status to my confessor, and will report to him at least four times a year on the observance of my promise.
5. that I will take all precaution to preclude scandal from the use of the privilege for which I petition.

So help me God and these Holy Gospels.

The petition is then submitted to the Most Reverend Bishop, together with a letter from the parish priest, and in Tribunal cases, from the Officialis. If further information is required, the petitioners are summoned, through the parish priest, to the Chancery. If necessary, the pastors of the parishes in which the parties lived at the time of their divorce and remarriage are contacted. When the information is complete and the arguments in favor of granting the permission are conclusive, the Ordinary grants the request by signing his name to the petition. The petition, together with all related correspondence and documents, is filed in the Chancery Archives.

A notice of the grant is mailed to the parish priest, together with a copy of the promises. The priest informs the couple and relays any particular instructions that may be given.

This method of procedure is proposed not as a perfect model, but as a practical approach which has proved satisfactory. Due precaution is being constantly taken to prevent the granting of such permission from becoming common knowledge. It is quite evident, from the circumstances of the cases presented, that people are not aware of the brother-sister solution. Most of the petitioners would have qualified for such permission long before its availability was suggested by a parish priest or a hospital chaplain.

In a recent case, one of the petitioners was a non-Catholic who had taken instructions seventeen years ago and since that time had lived as a Catholic, had induced her "husband" to observe all Catholic laws and practices, and had raised her children in the faith. For seventeen years she sought an opportunity to receive the sacraments. During the past three years, she underwent a series of operations to arrest the progress of a disease which will probably cause her death before the lapse of a year. Although she was well instructed, and well read in the doctrine and practice of the Catholic religion, and despite the fact that she was seeking a means of receiving the sacraments, she was ignorant of the possibility of a brother-sister arrangement until a hospital chaplain suggested it to her. This is but one of many cases which indicates the need for the curative program mentioned in the introduction of this discussion. It is also a case which proves that such a program can be carried on without scandal, and without detriment to the mission of promoting the salvation of souls.

It is my sincere hope that this paper will stimulate others to give this subject the serious attention it merits, and develop as perfect a method of procedure as possible. Such a method will complement the intensive preventive campaign, with a curative program, in behalf of marriage casualties. It is my hope that this discussion may in some way promote our efforts to restore the prodigal to a life of grace, and to lead all souls to eternal salvation.

m F-S

CESE OF CLEVELAND

No. \_\_\_\_\_

Name \_\_\_\_\_

PETITION FOR PERMISSION TO LIVE AS BROTHER AND SISTER

N. B. This petition may be used ONLY if (1) validation is IMPOSSIBLE, (2) separation is EXTREMELY difficult, (3) there is no danger of SCANDAL, and (4) danger of incontinency is precluded by the advanced AGE or GRAVE ILLNESS of the parties.

Each petition should be accompanied by a letter commenting on the above points and presenting all the arguments in favor as well as against the granting of the petition.

Most Reverend Bishop:

We, the undersigned, realizing that our marriage is invalid in the sight of God, and that we have no marriage rights whatever, finding it extremely difficult to separate, humbly request permission to live together as brother and sister, and to be readmitted to communion with the Church.

QUESTIONNAIRE FOR THE MAN. (*Parties are to be interviewed SEPARATELY and ALONE*)

Name and address \_\_\_\_\_

Date and place of birth \_\_\_\_\_

Religion \_\_\_\_\_ (*If Catholic*) When did you last receive the Sacraments? \_\_\_\_\_

(*If non-Catholic*) Are you interested in becoming Catholic? \_\_\_\_\_

Have you ever applied for such a permission before? \_\_\_\_\_ When? \_\_\_\_\_

What answer did you receive? \_\_\_\_\_

When, where and before whom did you attempt your present marriage? \_\_\_\_\_

About how many people knew at that time that the marriage was invalid? \_\_\_\_\_

Give names and ages of the children born of your present union \_\_\_\_\_

How long have you lived in this general locality? \_\_\_\_\_ Do any of your neighbors or friends know

that your marriage is invalid? \_\_\_\_\_ How many know this? \_\_\_\_\_

How many Catholics (*relatives and friends included*) know that your marriage is invalid? \_\_\_\_\_

How many of these know that it can not be validated? \_\_\_\_\_

Why are you unwilling to separate? \_\_\_\_\_

(*If ill*) What is the nature of your illness? \_\_\_\_\_

(*If wife is ill*) What is the nature of her illness? \_\_\_\_\_

How many times were you previously married? \_\_\_\_\_

Give date and place of your former wife's death \_\_\_\_\_

If she is still living, give the following data: \_\_\_\_\_

a. Name of spouse (*maiden*) \_\_\_\_\_ Religion \_\_\_\_\_

Is she a practicing Catholic? \_\_\_\_\_

b. When, where and before whom were you married? \_\_\_\_\_

c. How many children were there by this marriage? \_\_\_\_\_ Where do they now live? \_\_\_\_\_

d. What was the cause of separation and divorce? \_\_\_\_\_

e. When, where and by whom was the divorce secured? \_\_\_\_\_

f. Present name and address of your former wife \_\_\_\_\_

g. Has she remarried? \_\_\_\_\_ When? \_\_\_\_\_ Where? \_\_\_\_\_

(*If there was more than one previous marriage, Question 14 should be answered on an attached note in reference to each previous marriage.*)

Are you convinced that you can keep your promise to live as brother and sister? \_\_\_\_\_

Why do you say so? \_\_\_\_\_

Have you tried to live in such manner? \_\_\_\_\_ For how long? \_\_\_\_\_

Would you be able to support your wife if she were separated from you? \_\_\_\_\_

(*A negative answer should be verified by submitting information about the petitioner's income and assets.*)

# QUESTIONNAIRE FOR THE WOMAN. (To be interrogated SEPARATELY and ALONE)

1. Name and address \_\_\_\_\_
2. Date and place of birth \_\_\_\_\_
3. Religion \_\_\_\_\_ (If Catholic) When did you last receive the Sacraments?  
(If non-Catholic) Are you interested in becoming a Catholic?
4. Have you ever applied for such a permission before? \_\_\_\_\_ When? \_\_\_\_\_  
 What answer did you receive? \_\_\_\_\_
5. When, where and before whom did you attempt your present marriage? \_\_\_\_\_
6. About how many people knew at that time that the marriage was invalid? \_\_\_\_\_
7. Give names and ages of the children born of your present union \_\_\_\_\_
8. How long have you lived in this general locality? \_\_\_\_\_ Do any of your friends or neighbors know that your marriage is invalid? \_\_\_\_\_ How many know this? \_\_\_\_\_
9. How many Catholics *(relatives and friends included)* know that your marriage is invalid? \_\_\_\_\_ How many of them know that it can not be validated? \_\_\_\_\_
10. Why are you unwilling to separate? \_\_\_\_\_
11. *(If ill)* What is the nature of your illness? \_\_\_\_\_  
*(If husband is ill)* What is the nature of his illness? \_\_\_\_\_
12. How many times were you previously married? \_\_\_\_\_
13. Give date and place of your former husband's death \_\_\_\_\_
14. If he is still living give the following data:
  - a. Name and present address \_\_\_\_\_ Religion \_\_\_\_\_
  - b. When, where and before whom were you married? \_\_\_\_\_
  - c. How many children were there by this marriage? \_\_\_\_\_ Where do they now live? \_\_\_\_\_
  - d. What was the cause of separation and divorce? \_\_\_\_\_
  - e. When, where and by whom was the divorce secured? \_\_\_\_\_
  - f. Has your former husband remarried? \_\_\_\_\_ When, where and with whom? \_\_\_\_\_
  - g. Was his present spouse free to marry? \_\_\_\_\_ Was she a Catholic? \_\_\_\_\_  
(If there was more than one previous marriage, Question 14 should be answered on an attached note in reference to each previous marriage.)
15. Are you convinced that you can keep your promise to live as brother and sister? \_\_\_\_\_  
 Why do you say so? \_\_\_\_\_
16. Have you tried to live in such manner? \_\_\_\_\_ For how long? \_\_\_\_\_
17. Could your husband provide for your support, or could you support yourself if you were separated from him? \_\_\_\_\_  
*(If not)* Please explain \_\_\_\_\_

## PROMISES

*(To be made separately by each party in the presence of the other party)*

Realizing fully the sacredness of an oath, and my obligation before God, touching the Holy Gospels, I solemnly swear:

1. that under no circumstance will I ever attempt to live as husband and wife with my present consort.
  2. that if I violate this promise, I will not attempt to receive the Sacraments until I have separated, or referred the matter to the Bishop.
  3. that I will receive the Sacrament of Communion only in Churches where my marital status is not known to the parishioners.
  4. that I will explain my status to my confessor, and will report to him at least four times a year on the observance of my promise.
  5. that I will take all precaution to preclude scandal from the use of the privilege for which I petition.
- So help me God and these Holy Gospels.

Signed \_\_\_\_\_  
 Signed \_\_\_\_\_ Man  
 Priest \_\_\_\_\_ Woman  
 Date and place \_\_\_\_\_

# THE INVESTMENT OF CHURCH FUNDS\*

## INTRODUCTION

**M**ONEY by its nature is capable of two fundamentally different uses. On the one hand, money may be expended in such a way that it is consumed in the supplying of current necessities. On the other hand, money may be put to a use that is productive of income, or converted into property that is productive of income. Money may be consumed by expenditure for immediate needs, or it may be used as capital productive of income.

In the fulfillment of its mission, the Church must make use of temporal resources. The most efficient use of these material resources sometimes calls for their immediate expenditure, sometimes calls for their placement in uses productive of income. The determination as to which of these two modes of using property is to be followed is not left entirely to the discretion of immediate administrators. The canon law, having purposes in view that are broader and more universal than those seen by an immediate administrator who might be led to sacrifice future interests under the pressure of immediate necessity, establishes legal administrative patterns according to which the administrator must carry on the affairs of his office. The canon law on property administration preserves a proper proportion between present and future interests of the juristic person involved. The law protects the broader and future interests of this ecclesiastical person from the dangers inherent in complete discretionary power of administrators acting under the pressure of immediate and, frequently, urgent needs.

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Some provisions of the canon law restrict the alienation of church property and thus protect against the loss of productive and other property. Other provisions of the canon law declare that certain funds must be invested and be thus made a source of periodic income, generally, although not always, on a stable and permanent basis. The mandate of the law ordering that certain funds be converted into a source of income is a protection of the future interest of the juristic person through the prevention of undue expenditure for present temporary advantage. Both the law regarding alienation of church property and the law regarding investment have for a purpose the use of property most advantageous for the ecclesiastical juristic person in its continuing existence and for the religious and charitable activities carried on by that person.

The present study is intended to treat of the provisions of canon law requiring investment of certain specified funds, the controls established over acts of investment, and the qualities that must characterize ecclesiastical investments.

Investment as it is known today and as it appears in the *Codex Iuris Canonici* is a feature of relatively modern economic life. Productive wealth under the feudal economy of the Middle Ages did not have the fluidity and mobility that characterize productive wealth today. The problems of church law in governing the productive use of material resources were quite different in such a background from what they were after the disintegration of the feudal system of property tenure.

Accordingly, it is not surprising to find that the earliest sources of the present canon law respecting investment as they are indicated in the footnotes to the Code date from the late sixteenth and early seventeenth centuries.

Investment management and administration is a task made complex by the great variety of factors that must be considered in making investment decisions. It is a task best performed by skilled individuals working with properly equipped organizations. The scope of this present study is limited to a

consideration of canonical factors which must be regarded by ecclesiastical administrators. The writer has no intention of treating here any other factors which are of necessity involved in investment management. The division of this present study is threefold: first, a consideration of the general notions and concepts involved; secondly, a brief treatment of specific provisions of the canon law relating to investment; thirdly, a study of canon 1529 and the consequent relevance of certain provisions of the civil law regarding investment.

## I. GENERAL NOTIONS

### INVESTMENT

*Investment* has been defined as the act of directing the employment of funds into capital or into claims to income. It has also been described as meaning primarily the purchase of income yielding property in order to get an annual income rather than to make profits from changes in capital value. A canonist—Coronata—has defined investment as the expenditure of money for acquiring productive real estate, or the change of a sum of money into some other form of property, e.g., into stocks or bonds of governments or commercial corporations.

*Investment* is to be carefully distinguished from speculation. Money may be used productively in two ways: 1) by investment, i.e. by purchase of something that will yield periodic income, as, e.g., the purchase of a bond; 2) by the purchase of real estate or stock in a commercial corporation—not for the purpose of securing periodic income—but in the hope that the thing purchased will change in value and the purchaser will then be able to make a profit upon re-sale. This is the chief difference between investment and speculation: the former activity is aimed at securing periodic income; the latter is aimed at profit upon re-sale after a change in the value of the thing purchased. Since the change in value is essential if there is to be profit in speculative operations, there is quite generally a greater degree of risk involved in

speculation than in investment. Generally it is an unstable security that is going to figure in speculation precisely because fluctuations in value are so essential to speculative practices.

The Code by Canons 142<sup>1</sup> to 592<sup>2</sup> prohibits to clerics and religious certain business activities among which speculative practices are to be included. Speculation is essentially a form of trading for profit and accordingly is prohibited to clerics and religious. A response of the Sacred Congregation of the Holy Office of April 15, 1885 and a response of the Sacred Congregation for the Propagation of the Faith of July 7, 1893 have specifically prohibited speculative practices in ecclesiastical temporal affairs.<sup>3</sup>

There is another reason for the prohibition of speculative practices in ecclesiastical temporal matters and that is the degree of risk which usually characterizes speculation. The purpose for which stable and permanent church assets are to be used is the supplying of a periodic income and not the securing of an increase in the value of the assets themselves through risk-bearing speculative activities. In much the same manner and evidently for similar reasons, American civil law has forbidden speculation with funds whose principal must be kept intact so that regular income may be obtained for carrying on certain charitable or other activities.

<sup>1</sup> Can. 142. Prohibentur clerici per se vel per alios negotiationem, aut mercaturam exercere sive in propriam sive in aliorum utilitatem. Cf. *infra* (under *Decrees and Decisions*) the decree of the Sacred Congregation of the Council of March 22, 1950 (AAS, XLII, 330), attaching the penalty of automatic specially reserved excommunication for the violation of this prohibition, as well as providing for the removal from office of negligent superiors who tolerate the violation.

<sup>2</sup> Can. 592. Obligationibus communibus clericorum, de quibus in can. 124-142, etiam religiosi omnes tenentur, nisi ex contextu sermonis vel ex rei natura aliud constet.

<sup>3</sup> Cf. respectively nn. 1091 and 4925 in *Codicis Iuris Canonici Fontes* cura Eñi Petri Card. Gasparri editi (9 vols., Romae [postea Civitate Vaticana]: Typis Polyglottis Vaticanis, 1923-1939 [Vols. VII-IX ed. cura et studio Eñi Card. Iustiniani Serédii]).

Some financial dealings are exclusively speculative, as e.g., short-selling, and hence are prohibited in ecclesiastical affairs. It is not, however, possible to exclude all speculative considerations in the making of an investment. After all, the prospect of increase or decrease in the value of the thing to be bought is a most important investment consideration. The presence of such a consideration does not make for speculation. It is the degree in which this consideration figures and the predominant motive of profit upon re-sale that will determine whether or not a transaction is speculative.

Many organizations today—among them large charitable foundations and universities—use various investment formulas in the management of their investments. When certain levels of values are reached by securities or groups of securities these securities or groups are sold and replaced by others. Profit on re-sale and reinvestment of the profit can be the motivation; but certainly the use of some such formula system in investment management would not appear as speculative.

It is not consonant with the nature of modern investment to eliminate all consideration of anticipated change in value; nor is it possible to eliminate all risk. As long as a transaction is made with the prospect of and primarily for periodic income, and not for the purposes of profit after re-sale, the investment cannot be termed speculative.

Canon 142 points out that certain business practices—among which speculation is to be included—are prohibited not only to clerics and religious but also to their agents. Thus clerics or religious cannot evade the prohibition by committing church funds to such operations through their representatives. There would also be an obligation on the part of an ecclesiastical administrator not to commit funds in his care to financial organizations who would make use of them in speculative activities.

Pertinent to these notions regarding the nature of investment, it should be noted that canonists discuss the question

as to whether *bank deposit at interest* is to be considered as an investment of funds. Upon the answer to this question depends the applicability of the controls established by canon law for investment. If it is to be considered an investment then canonical controls apply as e.g., the requirement for the consent of the Ordinary.

The question seems best answered by a distinction. If bank deposit at interest is made primarily for administrative convenience, then it should not be considered as an investment. Hence, canonical controls for investment will not apply. If bank deposit at interest is made not merely for administrative convenience but as a means of securing periodic income in preference to other means such as the purchase of stocks and bonds, then such deposit would appear to be an act of investment and accordingly subject to the controls supplied by the canon law over investment. It should be noted that under American civil law, where trust funds are to be invested, bank deposit at interest is not considered as a proper productive disposition of these funds.<sup>4</sup>

#### STABLE CAPITAL

In treating of investment it is most important that a clear notion be had of the term *stable capital*. Assets which have been established as a permanent source of income—or ecclesiastical patrimony—are designated by the expression stable or fixed capital; assets which have not been so established as a permanent source of income are termed free or unstable capital. The canonical significance of this distinction lies in the fact that the restrictions and regulations upon alienation apply when stable capital is involved but not when free or unstable capital is involved.

Unfortunately, some confusion seems to have arisen among canonical writers regarding the nature of stable capital. Some appear to have regarded any investment of church funds as constituting those investments as part of the in-

<sup>4</sup> Cf. 18 Pa. 303; 2 Con. Sur. (N. Y.) 458.

alienable patrimony of the ecclesiastical juristic person involved. However, investments may be made without those investments becoming by the very fact of investment stable and inalienable capital elements. A specific designation by competent authority is required if capital is to be made part of the stable, fixed capital. The mere act of investment does not make free capital into stable capital.

The confusion on this point that appears among many writers may stem from older and now outmoded methods of financing ecclesiastical and, in secular parlance, charitable and educational activities. Years ago when the returns on investments were higher than today, many organizations financed their activities by the establishment of permanent endowments. The greater the endowment, the greater the revenue. Hence, enlarging the endowment was a goal constantly sought. Over the years and probably crossing a line of demarcation around the 1920's or 1930's, the trend in such financing definitely changed. Because of diminished rates of return upon investment, it became quite difficult to finance activities from income alone. Hence, expenditure of principal was resorted to. Many charitable trusts have been and are now set up on a self liquidating basis. The funds are invested but expenditure is made not only from income but also from the principal with the result that over a period of time the fund is entirely depleted. However, as one philanthropist has declared, each generation can be relied upon to support the charitable and educational works of its time.

In ecclesiastical financial affairs older ages relied upon permanent and perpetual patrimonies. Hence, some canonists, especially the older ones tend to regard every productive item of property as being incorporated into the permanent patrimony of the juristic person. But we are all aware of how different is modern financing of church activities in the United States at the present day. The church in carrying on its activities, for the most part relies upon immediate expenditure of contributions and upon the future generosity of the faith-

ful. The church does not emphasize dependence on invested financial reserves built up over the past. Hence, the accumulation of a permanent patrimony is not the goal that it once was.

Investment then may be made without the purchased investment becoming stable capital. Thus, e.g., surplus funds that are invested according to the directive of Canon 1523, 4°, may remain as free expendable capital if they were such prior to the investment.

#### INVESTMENT AND ALIENATION

An act of investment is not an act of alienation even though funds pertaining to stable capital are involved. For investment is not an alienation of property but a conversion of funds into income-producing property. Because investment decisions are so important and because of the variety of factors involved in making a sound decision, the law establishes certain controls over investment, such as that requiring the consent or consultation of other parties.

Efficient management of investments frequently calls for the sale of an investment and the re-purchase of another investment. This could occur because of a better rate of return available elsewhere, because of a lack of stability developing relative to the first investment or because of various other factors. A sale of an investment is obviously an act of alienation and would seem to require all the formalities demanded by the canon law when church property is alienated. A response of the Sacred Congregation of the Council on February 17, 1906<sup>5</sup> insisted that any such transactions wherein investments were sold were acts of alienation and accordingly the consent of the Holy See had to be had when the amount involved warranted this.

Vermeersch in *Periodica*<sup>6</sup> commented on this response and

<sup>5</sup> *Collectanea Sacrae Congregationis de Propaganda Fidei* (2 vols., Romae, 1908), n. 2229.

<sup>6</sup> "Annotationes"—*Periodica*, II (1911), 73-75; "De commutationibus titulorum anonymorum"—*Periodica*, II (1911), 89-93.

pointed out the hardships it worked upon administrators who frequently had to make changes in their investment portfolios. He marshalled a long list of arguments against the practicability of the decision of the Sacred Congregation and concluded that it was but a particular response and that an administrator of ecclesiastical property could act on the basis of other considerations and thus not be required to secure the authorization of the Holy See.

Canon 1539, § 2,<sup>7</sup> is a vindication of Vermeersch's position. It marks a reversal of the policy expressed in the 1906 response of the Sacred Congregation of the Council. This canon declares that administrators may convert "bearer securities" into other securities more or equally safe and productive provided they have the consent of the Ordinary, the diocesan Council of Administration, and of other interested parties. Thus there is not required in such transactions the authorization of the Holy See regardless of the value of the securities involved.

Securities are of two types—bearer securities whose income is payable to the bearer; and registered securities, which are registered in the name of the owner. Although Canon 1539, § 2, speaks of "bearer-securities", it is generally regarded that registered securities are to be ruled by the same norm. They are identical in most respects with bearer securities.

Because investment management is a highly complex affair, it has become the work of professionals. Vermeersch-Creusen accordingly point out that a general mandate can be given, with the consent of those indicated in Canon 1539, § 2, to a skilled lay person who may then use his own judgment and discretion in the management of the investment portfolio. It would seem that a bank or trust company could be so empowered.

<sup>7</sup> Can. 1539, § 2. Administratores possunt *titulos ad latorem*, quos vocant, commutare in alios titulos magis aut saltem aequè tutos ac frugiferos, exclusa qualibet commercii vel negotiationis specie, ac de consensu Ordinarii, dioecessani Consilii administrationis, aliorumque quorum intersit.

## INVESTMENT AS AN ACT OF EXTRAORDINARY ADMINISTRATION

Activities necessary in the administration of ecclesiastical affairs fall into two categories, viz., 1) those termed ordinary administration, and 2) those termed extraordinary administration. Among the former are included those activities necessary for the preservation of church property, the collection of income from such property, payments for current operating needs and the making of ordinary repairs. Acts of extraordinary administration include acts which do not occur periodically and are at the same time of more than ordinary importance. Various considerations point to the extraordinary character of an act of investment. Much depends upon the wisdom of the investment and a bad choice may mean a total loss of the funds committed. The law itself regards an act of investment as out of the ordinary by the various controls it establishes. Consent or consultation of others is required for various acts of investment. Some canonists have specifically termed investment as an act of extraordinary administration; so also, particular law has on occasion declared this. The I Synod of Altoona, Pa., in 1923, and the I Synod of Toledo, Ohio, in 1941, have declared that acts of investment are acts of extraordinary administration.

Some authors (e.g. Vromant<sup>8</sup>) have declared that investment is an act of ordinary administration when made only temporarily and with free capital. This opinion does not seem to be supported by the consideration of the intrinsic nature and importance of an act of investment. The most that could be said for this view would be that if the amount of money involved was quite small, then this circumstance could remove it from the realm of extraordinary administration.

Investment by its nature appears as an act of extraordinary administration. The significance of this lies in the applica-

<sup>8</sup> *Ius Missionariorum*, Vol. VI, *De Bonis Temporalibus Ecclesiae* (Louvain, 1927), n. 173.

bility of Canon 1527, § 1,<sup>9</sup> which requires the consent of the Ordinary for the validity of such acts. This consent should be furnished in writing but this condition pertains to the permissibility and not to the validity of the act.

Similarly, when a superior is obliged to obtain the consent of others, as for example in the case of the conversion of securities into other securities under the terms of Canon 1539, § 2, the securing of the consent—as, e.g., of the Council of Administration—affects the validity of the act. This maintains in virtue of Canon 105<sup>10</sup> which declares that validity is at stake in such a situation.

Where the law requires merely the counsel of other parties, this requirement cannot be regarded as affecting the validity of the act. A *dubium iuris* is practically universally recognized by canonists relative to Canon 105 on this point.<sup>11</sup> Because of the *dubium iuris*, the requirement cannot be urged as affecting validity. Canons 11<sup>12</sup> and 15<sup>13</sup> are decisive on this point.

Thus the general rule is that whenever consent is required relative to an investment act, the validity of the act depends

<sup>9</sup> Can. 1527, § 1. Nisi prius ab Ordinario loci facultatem impetraverint, scriptis dandam, administratores invalide actus ponunt qui ordinariae administrationis fines et modum excedant.

<sup>10</sup> Can. 105. Cum ius statuit Superiorem ad agendum indigere consensu vel consilio aliquarum personarum: 1° Si consensus exigatur, Superior contra earundem votum invalide agit; si consilium tantum, per verba, ex. gr.: *de consilio consultorum*, vel *audito Capitulo, parrocho*, etc., satis est ad valide agendum ut Superior illas personas audiat; quamvis autem nulla obligatione teneatur ad eorum votum, etsi concors, accedendi, multum tamen, si plures audiendae sint personae, concordibus earundem suffragiis deferat, nec ab eisdem, sine praevalenti ratione, suo iudicio aestimanda, discedat.

<sup>11</sup> Cf. Bastnagel, "The Requirement of Consultation for Valid Action"—*THE JURIST*, IX (1949), 365-395.

<sup>12</sup> Can. 11. Irritantes aut inhabilitantes eae tantum leges habendae sunt, quibus aut actum esse nullum aut inhabilem esse personam expresse vel equivalenter statuitur.

<sup>13</sup> Can. 15. Leges, etiam irritantes et inhabilitantes, in dubio iuris non urgent; . . .

on the securing of the consent. When counsel is demanded by the law, only permissibility is involved.

There are, however, two notable exceptions to this general rule: viz., 1) when religious invest certain of their own funds under the terms of Canon 533<sup>14</sup> and the Ordinary's consent is demanded and 2) when the dowries of women religious are invested and, in virtue of Canons 533 and 549,<sup>15</sup> the consent of the Ordinary is similarly required.

Authors dispute as to whether or not in these cases validity is at stake. Those who insist that the requirement of the ordinary's consent affects only lawful action point out that Canon 1527, § 1, with its invalidating effect applies only where the property involved is thoroughly under the control of the Ordinary as in the case of diocesan funds or funds of various parishes and diocesan organizations. These same authors declare that the invalidating effect of Canon 105 is similarly not applicable. This canon, they state, applies only to those situations where a superior must have the consent of others lower to him in rank. The wording of the canon seems to lend some support to this view. Hence, in this view the situation contemplated by Canon 105 is not verified because the Ordinary in no way is an inferior to the religious superior.

<sup>14</sup> Can. 533, § 1. Pro pecuniae quoque collocatione servetur praescriptum can. 532, § 1; sed praevisum consensum Ordinarii loci obtinere tenentur:

1° Antistita monialium et religionis iuris dioecessani pro cuiusvis pecuniae collocatione; imo, si monialium monasterium sit Superiori regulari subiectum, ipsius quoque consensus est necessarius;

2° Antistita in Congregatione religiosa iuris pontificii, si pecunia dotem professarum constituat, ad normam can. 549;

3° Superior vel Antistita domus Congregationis religiosae, si qui fundi domui tributi legative sint ad Dei cultum beneficentiamve eo ipso loco impendendam;

4° Religiosus quilibet, etsi Ordinis regularis alumnus, si pecunia data sit paroeciae vel missionis, aut religiosis intuitu paroeciae vel missionis.

§ 2. Haec item servanda sunt pro qualibet collocationis mutatione.

<sup>15</sup> Can. 549. Post primam religiosae professionem dos in tutis, licitis ac fructiferis nominibus collocetur ab Antistita cum suo Consilio, de consensu Ordinarii et Superioris regularis, si domus ab hoc dependeat; omnino autem prohibetur eam quoquo modo ante religiosae obitum impendi, ne ad aedificandam quidem domum aut ad aes alienum exstinguendum.

Much argument has been adduced by authors on each side of the question. It would appear that a doubt of law exists and where such a doubt obtains, an invalidating effect cannot be urged. Thus when religious invest dowry funds under the terms of Canon 549 and funds owned by their institute under the terms of Canon 533, the requirement of the local Ordinary's consent affects only the permissibility of the act. In only one case ruled by Canon 533 does the requirement for the local Ordinary's consent affect validity: viz. when the funds to be invested have been given by a donor directly to a parish or mission (see Canon 533, § 1, 4°). In such a case the local Ordinary has full control and supervisory powers. Hence the requirement for his consent will affect the validity of the investment act.

It would be well to note at this point that the selection of an investment normally rests with the immediate administrator. Supervisory power does not properly extend to the actual performance of administrative acts. Hence when consent is required under the law, this is not to be taken as meaning that the superior whose consent is necessary is to make the actual administrative selection of an investment.

## II. SPECIFIC PROVISIONS IN THE CODE REGARDING INVESTMENT

In *The Code of Canon Law* various specific provisions are made relative to investment. Some of these provisions require that certain types of funds be invested so that they will be productive and not remain sterile. Other provisions establish controls over acts of investment. We shall briefly discuss these various specific provisions of the law.

### 1. INVESTMENT OF SURPLUS FUNDS

Canon 1523, 4°, <sup>16</sup> requires that money of an ecclesiastical moral person which is not needed for current operating ex-

<sup>16</sup> Can. 1523. Administratores bonorum ecclesiasticorum diligentia boni patrisfamilias suum munus implere tenentur; ac proinde debent: 4° Pecuniam ecclesiae, quae de expensis supersit et utiliter collocari potest, de consensu Ordinarii, in emolumentum ipsius ecclesiae occupare; . . .

penses—in other words, surplus funds—which can be usefully invested, must be so invested with the consent of the Ordinary for the benefit of the ecclesiastical moral person involved. Thus, such funds are not permitted to be wasted by being held in a sterile condition. The law requires their productive disposition in investment. It would be a violation of this provision of the law to allow sums of money to lie idle in safes, safe deposit boxes or on deposit in checking accounts that do not bear interest. Extremely small sums that could not be conveniently invested could be profitably placed in bank deposit at interest, although if the sums are so small as to make investment impractical, this provision of the law would not apply.

The question arises as to whether or not sums that could be profitably invested could, under the terms of Canon 1523, 4°, be placed in bank deposit at interest. Such deposit does have the quality of productiveness but strictly speaking it is not an investment. If, however, the security of such a disposition of funds and their ready availability were exceptionally important considerations, it would seem that such deposit at interest would be acceptable under the terms of the canon. A wide variety of factors would have to be considered and the consent of the Ordinary as required in the canon would be necessary if bank deposit at interest were to be selected as the mode of investment in preference to other modes of investment.

The investment of surplus funds must be made for the benefit of the juristic person which owns them. It would be a serious violation of this canon as well as of other provisions of the law to use surplus church funds for the advantage of private individuals even though the principal were not touched.

If an Ordinary encourages the placing of surpluses at interest with a central diocesan fund, it would seem appropriate that administrators should feel encouraged to make their surpluses or parts thereof available to the diocesan fund. Thus

the juristic person would receive benefit in the way of interest; the diocese and other parishes and diocesan projects would also benefit. It would not appear that the total benefit would have to accrue to the moral person which owns the surplus.

However, it would seem that an administrator enjoys a certain amount of discretion—subject to the Ordinary's consent—as to the choice of the investment. The Ordinary should not take to himself the actual selection of the investment as this is a function pertaining to the administrator.

This norm of Canon 1523 postulates the consent of the Ordinary to the investment of surplus funds. As has been seen, investment is an act of extraordinary administration. Accordingly, the Ordinary's consent is required for the validity of the act.

The question has arisen among canonical writers as to whether or not investment of surpluses under this canon establishes the assets as stable capital subject to the restrictions on alienation of church property. When the funds are free capital elements, the mere act of investment does not thereby render these assets inalienable. They do not thus become part of any permanent patrimony. Assets retain respectively their free or their inalienable status—whichever the case may be—regardless of investment. Property is incorporated into stable capital subject to alienation restrictions by designation as such by competent authority. Since such a status imposes restrictions upon administrators, it should not easily be presumed but must be clearly established.

Funds that are being held for a period of time before being expended or funds that are being accumulated for some specific project do not become inalienable because of their investment. And efficient administration will see that such funds are properly invested as required by Canon 1523, 4°, rather than allowed to remain idle when profit could be derived from them.

Some authors who declare that an investment may be made under the terms of this canon without the assets becoming part of inalienable capital, make the further point that when such an investment is made the consent of the Ordinary need not be secured. This further conclusion appears to be based on outright confusion when viewed in the context of modern church financing. The law here is treating of investment and this is to be clearly distinguished from incorporation of assets into stable, inalienable capital. Hence where investment is involved, the consent of the Ordinary is required as stated in the law.

## 2. INVESTMENT OF THE ENDOWMENT OF A BENEFICE

The endowment of a benefice may consist of any one of various sources of income. Canon 1410<sup>17</sup> enumerates these various sources, viz. property owned by the benefice (a non-collegiate juristic person), payments by some family or some juristic personality, voluntary offerings of the faithful, stole fees, and choral distributions.

When the endowment consists of cash, Canon 1415, § 2<sup>18</sup> points out what is already obvious, viz., that for income to be realized, the cash must be invested. This paragraph of the canon prescribes that the Ordinary must see to it that the cash is invested as quickly as possible in safe and productive real estate or securities. In making this investment the Ordinary must consult the diocesan Council of Administration.

<sup>17</sup> Can. 1410. *Dotem beneficii constituunt sive bona quorum proprietates est penes ipsum ens iuridicum, sive certae et debitae praestationes alicuius familiae vel personae moralis, sive certae et voluntariae fidelium oblationes, quae ad beneficii rectorem spectent, sive iura, ut dicitur, stolae intra fines taxationis dioecesanæ vel legitimæ consuetudinis, sive choralis distributiones, exclusa tertia earundem parte, si omnes redditus beneficii choralibus distributionibus constant.*

<sup>18</sup> Can. 1415, § 2. *Si dos in numerata pecunia constituatur, Ordinarius, audito dioecesano administrationis Consilio de quo in can. 1520, curare debet ut quamprimum collocetur in tutis et frugiferis fundis vel nominibus.*

Although investment is normally to be made by the immediate administrator, it would appear that in the case of endowments of benefices, as ruled by this canon, the Ordinary is the one charged with the investment selection. The tenor of the canon and the declarations of many canonical commentators appear to be a sound basis for this view.

It should be noted that a circular letter issued in 1929 to the Bishops of Italy from the Sacred Congregation of the Council provided a plan for diocesan depositories wherein investments pertaining to benefices were to be kept under the administration of the bishop and the Council of Administration.

### 3. INVESTMENT OF PROCEEDS AFTER ALIENATION

Among the restrictions placed upon inalienable property is the provision of Canon 1531, § 3,<sup>19</sup> requiring that when, according to law, such property is alienated, the proceeds must be reinvested. Some authors have understood that the superior empowered by the law to permit alienation can permit the proceeds to be consumed by outright expenditure. Canon 1531, § 3, appears as a prohibition to any such practice. The Sacred Congregation of the Council in 1919<sup>20</sup> explicitly declared that the consumption of the principal requires the permission of the Holy See or a dispensation from this provision of the law.

It may well be noted that normally an act of investment is an act of administration—albeit extraordinary. As an act of administration it should be performed by the immediate administrator; as extraordinary, the consent of the local Ordinary will be required for its validity as has been seen.

<sup>19</sup> Can. 1531, § 1. *Res alienari minore pretio non debet quam in aestimatione indicatur.*

§ 3. *Pecunia ex alienatione percepta caute, tuto et utiliter in commodum Ecclesiae collocetur.*

<sup>20</sup> S.C.C., *resolutio*, 13 iul. 1919—AAS, XI (1920), 416; Bouscaren, *The Canon Law Digest*, I (Milwaukee: Bruce, 1934), 729.

## 4. DOWRIES OF WOMEN RELIGIOUS

Canon 549 legislates that the dowry is to be invested after the first profession of the religious in safe, licit, and productive securities. The investment is to be made by the superioress with her council and with the consent of the Ordinary and of the regular superior if the house is subject to one.

The canon does not expressly declare that the *consent* of the council of the superioress be had. The constitutions of the religious community may give more explicit direction on this point than the general law. If no such explicit requirement for consent is made, it would appear that the superioress would satisfy the law by merely consulting the council.

The consent of the Ordinary is required. We have previously seen that when dowries of religious are involved this requirement cannot be urged as affecting validity. Strong arguments have been adduced against the applicability of Canon 1527, § 1 and Canon 105 to dowry investment as has been already discussed. Since these arguments are strong enough to induce at least a *dubium iuris*, Canons 11 and 15 make it impossible to regard the requirement for the Ordinary's consent as affecting validity.

One further note of significance must be made. The canon declares that dowry investments are to be made in *securities*. The law of the church prior to the Code made no such restriction upon dowry investment. Dowry investments could then be made in real estate. The law of the Code has made a clear restriction of permissible investments to investment in securities. Not all authors admit this. Their position, however, appears untenable for the following reasons.

First, the wording of the law is quite clear.

Secondly, the reasons for the restricted scope of permissible investments are not hard to find. Securities may generally be more readily liquidated than holdings in real estate. Since one of the purposes of the dowry is to supply a religious with some source of livelihood should she leave the community, ability to liquidate an investment quickly is most important.

There is also the consideration that administration of securities can be handled with greater ease and facility than administration of real estate.

Thirdly, a proposed draft of *The Code of Canon Law* dated 1912 provided on this point that *an investment* be made of dowry funds. No restrictive wording was employed. The present text of the Code shows such a positive restriction by the use of the word "nominibus," marking a rejection of the concept contained in the earlier draft of the law.

The law of Canon 549 points out that the dowry is not to be spent before the death of the religious. Thus the investment must be kept distinct from general funds of the community so that it may maintain its individuality.

Greater facility of administration and diversification of investments may be made by pooling various dowries. There does not appear to be any prohibition in the law against such a consolidation of dowry funds. It should again be noted, however, that such funds and assets must be kept segregated from the general funds of the community and that the books of the institute must preserve the identity of the separate dowries.

##### 5. THE WISHES OF BENEFACTORS AS ESTABLISHING NORMS REGARDING INVESTMENTS

It should be noted that the wishes of the faithful in donating to pious causes must be diligently carried out. Canon 1514 points out this obligation and at the same time indicates that the wishes of the faithful must be observed even regarding the manner of administration and the disbursement of property and funds. Thus administrative directives given by the benefactor relative to investment administration receive canonical effect. Such is also the case when the benefactor has indicated that the principal is to be preserved intact as an endowment and income alone is to be expended. Canon 1515 establishes the Ordinary as the executor of pious

disposals of property and charges him with the duty of seeing that the wishes of the benefactor are properly carried out.

#### 6. PIOUS FOUNDATIONS

Administrators are faced with investment decisions and management when they have in their care "pious foundations." A pious foundation consists of property given to some moral person in the Church with the obligation perpetually or for a long period of time of celebrating masses, of carrying out other defined ecclesiastical functions, or of performing certain pious or charitable works from the annual income from the property. It should be noted that the acceptance of perpetual obligations is today regarded as unwarranted and impractical for a great many reasons. With a few exceptions perpetual obligations will not be accepted by Church authorities. This is especially true of mass foundations. One of the exceptions to this policy is the establishment of endowment for the perpetual care of cemetery lots.

Among the various activities supported by pious foundations may be enumerated the following: the saying of masses, the support of education by scholarships or fellowships or seminary burses, the support of various charitable activities, and the care of cemetery lots.

Four elements are essential to the notion of a pious foundation, viz.: 1) property must be involved which is to be held as a source of income; 2) the property must be given to a moral person in the Church; 3) there must be an obligation in justice, deriving from a contract, to perform certain works; 4) the obligation must be one that is to be carried out perpetually or over a long period of time. While authors disagree as to the extent of time that may be considered "long", a great many settle on ten years as being a minimum period to fulfill this requirement. If the time period is shorter than this, the whole arrangement is to be regarded not as a pious foundation but as a pious trust, governed by the pertinent norms for pious trusts.

Money or other movable property assigned as endowment of a pious foundation, according to Canon 1547,<sup>21</sup> is to be deposited immediately in a safe place designated by the local Ordinary so that it may be protected and invested as soon as possible by the local Ordinary who must, in doing this, consult any interested parties and the diocesan Council of Administration. The investment is to be made in behalf of the foundation as beneficiary with an express and individual mention of the obligations attached thereto.

As has been seen, the obligation of the Ordinary to consult interested parties and the diocesan Council of Administration affects the permissibility of the act of investment and not its validity.

Here one portion of Canon 1547 seems to warrant clarification. The canon speaks of the investment being made "with an express and individual mention of the obligation attaching to the foundation". This would suggest that each individual endowment is to remain distinct and segregated from all other funds and endowments so that the specific obligation attaches to the distinct endowment. Some authors have regarded the wording of the canon as requiring such a complete segregation of the endowment.

However, in the management of endowments, it greatly facilitates administration to pool various endowments and manage them as a group rather than to handle each as a separate unit. This practice also provides greater safety to each foundation and thus better insures the fulfillment of its attached obligations. If the endowment of a foundation were strictly segregated and invested in the securities of one corporation, the failure of that corporation would wipe out the endowment. If various endowments are pooled, the invest-

<sup>21</sup> Can. 1547. *Pecunia et bona mobilia, dotationis nomine assignata, statim in loco tuto, ab eodem Ordinario designando, deponantur ad eum finem ut eadem pecunia vel bonorum mobilium pretium custodiantur et quamprimum caute et utiliter secundum prudens eiusdem Ordinarii arbitrium, auditis et iis quorum interest et dioecesano administrationis Consilio, collocentur in commodum eiusdem foundationis cum expressa et individua mentione oneris.*

ments may be more easily diversified, i.e., spread out over various corporations, various types of business activities, and various geographic localities. The failure of any one corporation would not then wipe out any one endowment but the loss would be distributed over the group.

The Catholic University of America some years ago experienced a grave financial crisis as the result of failure in properly diversifying its investments. There was a wholesale commitment of funds to a particular real estate development project. On the collapse of the project the university was faced with serious financial difficulties.

In American civil law some degree of diversification of investment is generally required for all trust funds as a means of protecting them. Thus consolidation of endowments is a great advantage in facilitating administration and in giving greater safety to the endowments concerned. Although some canonical writers would not allow consolidation or commingling of endowments, others and with better reason would consider it as permitted under the terms of Canon 1547. All, of course, insist that endowments either separately or as a group be strictly segregated from other funds of the ecclesiastical moral person concerned and that their individual identity be preserved in the books of the moral person.

As to which Ordinary is concerned in the management of pious foundations, the general governing principle to be applied is that the local Ordinary is concerned when ecclesiastical moral persons subject to his control are involved and also when non-exempt religious are involved. Regarding exempt religious, the matter is extremely complicated by considerations of various canons (e.g. Canons 533, 1516,<sup>22</sup> and 1550<sup>23</sup>) and of the

<sup>22</sup> Can. 1516, § 1. *Clericus vel religiosus qui bona ad pias causas sive per actum inter vivos, sive ex testamento fiduciarie accepit, debet de sua fiducia Ordinarium certiores reddere, eique omnia istiusmodi bona seu mobilia seu immobilia cum oneribus adiunctis indicare; quod si donator id expresse et omnino prohibuerit, fiduciam ne acceptet.*

§ 2. *Ordinarius debet exigere ut bona fiduciaria in tuto collocentur et vigilare pro executione piae voluntatis ad normam can. 1515.*

privilege of exemption itself. Any particular case would have to be approached with a view to the various canons that are pertinent and the nature of the benefits intended by the founder of the pious foundation.

In general, however, it is agreed that when a foundation is established with even a non-exempt religious institute of pontifical approval for its own benefit or in benefit of its own proper purposes, such a foundation does not come under the supervision of the local Ordinary.

### III. CANON 1529 AND AMERICAN STATE LAW

We have been considering those factors relative to investment of church funds which are directly and immediately canonical in their origin. In conclusion, a few words are in order regarding Canon 1529<sup>24</sup> and the canonical effect it gives to certain provisions of the law of the secular jurisdiction. In its earlier law the Church in its own forum followed the provisions of the Roman law as it was almost universally received in the Middle Ages relative to contracts dealing with property. Today the Church by Canon 1529 canonizes for its own use the civil law on contracts and payments.

Thus, the law of the secular jurisdiction has canonical effect relative to the contracts involved in investment management.

§ 3. Bonis fiduciariis alicui religioso commissis, si quidem bona sint attributa loci seu dioecesis ecclesiis, incolis aut piis causis iuvandis, Ordinarius de quo in §§ 1, 2, est loci Ordinarius; secus, est Ordinarius eiusdem religiosi proprius.

Can. 1515, § 1. Ordinarii omnium piarum voluntatum tam mortis causae quam inter vivos executores sunt.

§ 2. Hoc ex iure Ordinarii vigilare possunt, ac debent, etiam per visitationem, ut piae voluntates impleantur, et alii executores delegati debent, functi munere, illis reddere rationem.

§ 3. Clausulae huic Ordinarium iuri contrariae, ultimis voluntatibus adiectae, tanquam non appositae habeantur.

<sup>23</sup> Can. 1550. Si agatur de piis foundationibus in ecclesiis, etiam paroecialibus, religiosorum exemptorum, iura et officia Ordinarii loci, de quibus in can. 1545-1549, exclusive competunt Superiori maiori.

<sup>24</sup> Can. 1529. Quae ius civile in territorio statuit de contractibus tam in genere, quam in specie, sive nominatis sive innominatis, et de solutionibus, eadem iure canonico in materia ecclesiastica iisdem cum effectibus servantur, nisi iuri divino contraria sint aut aliud iure canonico caveatur.

The contract to sell and the contract of sale are the most obvious objects of this canonization.

The laws and their judicial constructions in the various states extend in other ways to investment matters. It is interesting to note that the law of New York State requires that "the trustees of an incorporated Roman Catholic Church or of a Ruthenian Greek Church shall not invest its funds . . . without the consent of the archbishop or bishop of the diocese to which such church belongs or in the case of their absence or inability to act, without the consent of the vicar general or administrator of such diocese". This is an interesting example of the civil law paralleling the canon law.

Where a charitable trust under the law of the secular jurisdiction exists, the trustee must look to this law for various regulations to be followed in his execution of the trust. Most states prohibit the mingling of the funds of various trusts unless the settlors of the trusts authorize this. Certain standards are established regarding the permissible investments that may be made with trust funds. Some states merely demand that the degree of care be exercised in investing that would be exercised by a prudent man in handling his own affairs. Other states go so far as to establish lists of securities that are considered as permitted investments (e.g., for "perpetual care" cemetery funds in New York). It is generally required that the investment be properly diversified for safety.

Ecclesiastical moral persons exist under various forms of civil incorporation. The funds of charitable corporations are subject to various provisions of civil law that have implications in investment administration. At times certain funds given to charitable corporations have been regarded by the courts as being held in trust by the charitable corporation; other funds are regarded as held absolutely by the corporation without the nature of a trust; and there is also a middle ground viz., where the courts have declared that certain funds

though not strictly held in trust, are subject to equitable restrictions placed by the donors.

Church administrators must look to the legal status of their funds under civil law. Canon 1529 may give canonical effect to such status, and thus not only in the civil forum but in the ecclesiastical forum as well, litigation could be decided on the factors deriving from the law of the secular jurisdiction.

This paper has attempted to present the canonical factors relative to investment management in ecclesiastical affairs. There was first a portrayal of general principles concerned; secondly, an analysis of the canons specifically dealing with investment of church funds; and lastly, there has been a mere indication of areas in the law of the secular jurisdiction where certain statutes and judicial constructions may be found which must be regarded as having been given canonical effect by Canon 1529.

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#### HARVARD LAW SCHOOL EXHIBITION OF THE *CORPUS IURIS CANONICI*

Throughout the month of December 1950 the Treasure Room of the Harvard Law School Library housed an exhibition of manuscripts and early printed books of the *Corpus Iuris Canonici*. Included in the exhibition were a 13th century manuscript of the *Decretum*, and two 15th century editions of it containing illuminated and historiated miniatures; a 13th century manuscript of the *Decretales* and two 15th century incunabula; a 15th century edition of the *Liber Sextus*; the third edition of the *Clementinae* (1470); several incunabulum editions of the *Extravagantes Ioannis XXII* and of the *Extravagantes communes*; Niccolo Tedeschi's *Lectura Super Libros Decretalium* (Basle, 1488); Innocent IV's *Apparatus Super Quinque Libros Decretalium* (Strasbourg, 1478); Henricus de Segusio's *Summa Super Titulos Decretalium* (Speyer, 1478) and Ioannes Andreae's *Novella Super Sexto Decretalium* (Venice, 1499). Also on display were the editions of 1582 (of the *Correctores Romani*), of 1685-87 (of the Pithou brothers), of 1833-39 (of Richter), and of 1879-81 (of Friedberg).

## HEARSAY AT COMMON LAW AND AT CANON LAW\*

### PART I. THE NATURE AND THE PURPOSE OF THE HEARSAY RULE

Canon 1789 provides that, in weighing testimony which is offered, the judge is to consider whether the witness testifies on the basis of his own knowledge, especially as to that which he himself saw and heard, or on the basis of belief, or of rumor, or of what he has heard from others.<sup>1</sup> The fact that a thing is known by hearsay does not exclude it from consideration by the court in canonical, as it does in civil, procedure, but it does put the judge on notice<sup>2</sup> that he must apply cer-

\* Paper read at Grand Rapids, Michigan, before the Annual Meeting of the Midwest Chapter of The Canon Law Society of America, September 13, 1950, by Rev. Thomas Owen Martin, Ph.D., S.T.D., J.C.D., LL.M. Part I of the paper is published herewith; Part II will appear in the April 1951 issue. Part II deals with the exceptions to the Hearsay Rule.

<sup>1</sup> Cf. Can. 1789, 2°.

<sup>2</sup> Cf. *Decretum Magistri Gratiani*, ed. Lipsiensis secunda post Aemilii Ludovici Richter curas ad librorum manu scriptorum et editionis Romanae fidem recognovit et adnotatione critica instruxit Aemilius Friedberg, editio anastatice repetita (Leipzig, 1922) [hereinafter cited in the following style], c. 7, C. II, q. 1, in which St. Gregory the Great (603) instructed John, the Defensor, that in deciding the case which he was sent to investigate he was to consider carefully the persons who brought the accusation, and whether their testimony is based on hearsay, "*ex auditu.*"

Witnesses are required, at Canon Law, to state the source of their knowledge, cf. Can. 1774; *Decretum Gratiani*, emendatum et notationibus illustratum una cum glossis restitutae cum privilegio Gregorii XIII, Pont. Max. et aliorum Principum (Rome, 1582) [hereinafter cited, Glossa], ad v. *Specialiter* in c. 7, C. II, q. 1; c. 3, C. IV, q. 3. The judge is bound to inquire about that source, and if the witness does not answer the question his word is of no value, cf. *Decretales Gregorii Papae IX*, suae integritati una cum glossis restitutae cum privilegio Gregorii XII, Pont. Max. et aliorum Principum (Rome, 1582) [hereinafter cited, Glossa], ad v. *De causis* in c. 37, X, *de testibus et attestationibus*, II, 20; c. 3, C. IV, q. 3. If the judge fails to ask the question and the witness

tain further tests to determine the value<sup>3</sup> of the evidence

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simply says that he knows a thing, the testimony stands. The judge is also to investigate the persons of the witnesses, i.e. whether they are upright persons, cf. c. 2, C. IV, q. 3; Can. 1757.

<sup>3</sup> Cf. *Decretalium Collectiones*, ed. Lipsiensis secunda, post Aemilii Ludovici Richteri curas instruxit Aemilius Friedberg, editio anastatice repetita (Leipzig, 1922) [hereinafter cited in the following style], c. 7, X, *de consanguinitate et affinitate*, IV, 14, where it is stated that hearsay evidence does not have much value, is "*minus validum*," and that freedom to introduce it is not to be extended.

Hearsay witnesses create a presumption, notes Reiffenstuel, *Ius Canonicum Universum*, ed. noviss. 6 vols. in 5 (Rome, 1831-1834) [hereinafter cited in the following style], II, 20, 370. If other circumstances (*adminicula*), to be weighed in the discretion of the judge, are joined to such a presumption "full" proof will result therefrom, cf. *op. cit.*, II, 20, 371. A hearsay witness proves against the one who produces him, cf. *op. cit.*, II, 20, 372. He adds that some authors consider that the effect of the presumption by the hearsay witness is to shift the burden of proof to the adversary, while others deny such a result, cf. *op. cit.*, II, 20, 370.

Schmalzgrueber, *Ius Ecclesiasticum Universum*, 5 vols. in 12 (Rome, 1843-1845) [hereinafter cited in the following style], III, 20, 111-112, says hearsay testimony proves nothing, "*nihil probat*," though there are exceptions.

Roberti, *De Processibus*, 2 vols. (Rome, 1926), vol. II-1, at 74, notes that the fact that one testifies to something he has heard from others affects the objective value of the testimony. He likewise notes that Canon Law follows Roman Law substantially in leaving the judge free to weigh the evidence offered, though it has taken some elements of Germanic law as to "full," and "semi-full," proofs, *op. cit.*, at 31-32. The modern Code of Canon Law, he says, has tried to get away from the arithmetical computations of medieval lawyers and judges, according to which the ideal witness was considered as a unit, one less than ideal as a fraction, and the resulting process of addition gave the judge the answer to the case, to return to the Roman idea that it was finally up to the judge to decide the matter on the basis of all the proofs adduced, *op. cit.*, at 72.

Wernz-Vidal, *Ius Canonicum ad Codicis Normam Exactum*, 7 tomes in 9 vols., VI-1 (Rome, 1927), at 425, says hearsay evidence raises a certain presumption to be weighed by the judge, especially if the deposition is supported by other circumstances. They feel that the rules of the medieval commentators as to the "fullness" of proof are still useful, lest the judge decide arbitrarily, and that the Court of Appeal may have some idea of how he reached his decision, *op. cit.*, at 421.

A Coronata, *Institutiones Iuris Canonici*, III (Turin, 1933), at 224, says hearsay evidence does not constitute "full" proof, but, at most, raises a presumption, except in certain cases wherein circumstances concur to make the proof complete.

offered by a witness who repeats what he has heard from others.

For the lawyer, the "Hearsay Rule" is but one of the five Auxiliary Rules of Probative Policy.<sup>4</sup> These five rules are: 1—Preferential; 2—Analytic (or Scrutinative); 3—Prophylactic; 4—Simplificative; 5—Quantitative (or Synthetic).<sup>5</sup> The Preferential rule simply requires that one kind of evidence, the "best" evidence, be offered before resort can be had to another. Thus, the actual document must be offered before a copy thereof can be offered. Certain witnesses must be offered before others of less value, or must be offered against certain others.<sup>6</sup>

The Analytic (or Scrutinative) rule aims at improving the probative value of the evidence. To this end it subjects the evidence offered to a scrutiny or analysis (cross-examination)<sup>7</sup> calculated to discover and expose in detail its possible weaknesses, and thus to enable the tribunal to estimate it at no more than its actual value.<sup>8</sup> There is but one rule of this type, the "Hearsay Rule."<sup>9</sup>

The Prophylactic rule eliminates before the introduction of evidence the possible defects therein, e.g. by requiring an oath,<sup>10</sup> by providing a perjury-penalty,<sup>11</sup> by separation of wit-

<sup>4</sup> Cf. Wigmore, *A Treatise on the Anglo-American Law of Evidence in Trials at Common Law*, 3. ed., 10 vols. (Boston, 1940), § 1171.

<sup>5</sup> Cf. Wigmore, *op. cit.*, § 1172.

<sup>6</sup> Cf. Wigmore, *op. cit.*, § 1360.

<sup>7</sup> Cf. Can. 1773, 1774. At Canon Law the judge does the examining. He is not a mere "umpire" to see that the "champions" of the parties observe the rules of a sort of "ordeal by combat," but a public official charged with applying the law to the facts of the controversy between the parties (cf. Can. 17, § 3) for the purpose of obtaining the greatest possible happiness for the community and for the individuals, which is the purpose of Law itself; cf. St. Thomas Aquinas, *Summa Theologica*, I-II, q. 90, a. 2.

<sup>8</sup> Cf. Can. 1789, 2°.

<sup>9</sup> Cf. Wigmore, *op. cit.*, §§ 1172, 1360.

<sup>10</sup> Cf. Can. 1767.

<sup>11</sup> Cf. Can. 1757, § 2, 1°; 1795, § 2.

nesses,<sup>12</sup> by giving prior notice to the opponent of the evidence to be used.<sup>13</sup>

The Simplificative rule rigidly strikes out and excludes as undesirable certain testimony liable to confuse, under certain conditions, the process of proof.<sup>14</sup> Thus, it excludes evidence offered at an improper time.<sup>15</sup> It prevents an excessive number of witnesses.<sup>16</sup> It rejects certain persons as too influential, or opinion witnesses when they would be superfluous and liable to be abused. It rejects, too, circumstantial evidence of the accused's moral character when it would be liable to cause undue prejudice.<sup>17</sup>

The Quantitative (or Synthetic) rule requires certain evidence to be associated with other evidence before it is accepted.<sup>18</sup> Thus, it requires a definite minimum number of witnesses, e.g. two to an overt act of treason.<sup>19</sup> It provides that one witness is not sufficient without circumstantial evidence of a specified sort.<sup>20</sup>

Hearsay is an extra-judicial testimonial assertion. As such it is not made at the time and in the place where the lawyer

<sup>12</sup> Cf. Can. 1772, § 1.

<sup>13</sup> Cf. Can. 1763; Wigmore, *op. cit.*, § 1360.

<sup>14</sup> Cf. Wigmore, *op. cit.*, § 1360.

<sup>15</sup> Cf. Can. 1730.

<sup>16</sup> Cf. Can. 1762.

<sup>17</sup> This is more important when a jury is liable to be swayed by impassioned *viva voce* testimony than when a bench of judges is considering the cold record, as at Canon Law.

<sup>18</sup> Cf. Wigmore, *op. cit.*, § 1360; Can. 1791.

<sup>19</sup> Cf. U. S. Const. Art. III, sec. 3, § 1.

<sup>20</sup> Cf. c. 3, X, *de successionibus ab intestato*, III, 27. This was a will case, in which the bishop asserted that the decedent archpriest was *non compos mentis* at the time of his oral transfer of the property. The witnesses, who testified in addition to the one real witness in the case, did not constitute sufficient proof, Innocent III (1198-1216) held, though they aided the assertion of the abbot and helped his case very much.

The Glossa ad v. *Unus testis* in h.c., remarks that one witness does not suffice to prove the case, but, if there are other presumptions, he does.

can subject it to his favorite weapon, "cross-examination." He argues, therefore, that it should be prevented from coming before the jury because, even assuming the original speaker to have been qualified by knowledge and veracity as a witness,<sup>21</sup> his testimony cannot be subjected to what the lawyer considers certain essential tests or investigations calculated to demonstrate its real value by exposing latent sources of error.<sup>22</sup>

Cross-examination is, of course, not infallible. It may fail to disclose errors and inaccuracies.<sup>23</sup> The witness may die before he can be cross-examined or while he is being cross-examined. It may also happen that the witness refuses to answer<sup>24</sup> or the party prevents an answer. It may happen, too, that the witness answers the direct questions "non-responsively," i.e. without dealing with the subject-matter of the question, so that the cross-examiner cannot get at his knowledge. Cross-examination fails, likewise, when the direct examination is so framed as to prevent adequate cross-examination.<sup>25</sup> Cross-examination may fail, too, for lack of interpretation of the testimony of an alien, etc. There may be other circumstances which prevent cross-examination from reaching its purpose.

<sup>21</sup> Wernz-Vidal, *op. cit.*, VI-1, at 425, note that in hearsay the usual double presumption is redoubled, i.e., one must presume that the one from whom the witness heard the matter was both properly observant, and faithful and truthful in reporting it, and that the witness was properly attentive when he heard it and is now faithful and truthful himself when he testifies on the witness-stand.

<sup>22</sup> Cf. Wigmore, *op. cit.*, § 1361.

<sup>23</sup> Cf. Wigmore, *op. cit.*, § 1390.

<sup>24</sup> Such refusal, at Canon Law, invalidates his testimony, cf. Glossa ad v. *De causis*, in c. 37, X, *de testibus et attestationibus*, II, 20.

<sup>25</sup> When the judge does the questioning, as at Canon Law, instead of enforcing the rules of the contest between the lawyers, as at Common Law, there is less danger that the witness will answer "non-responsively," or that the direct examination will be so framed as to prevent adequate cross-examination. The judge asks whatever questions will enable him to get at the truth.

In the case in which the witness refuses to answer or the party prevents an answer, it is necessary to consider whether this relates to but one or two questions, or to more. If it relates to but one or two questions, the judge, at Common Law, weighing the circumstances, may accept the rest of the testimony. If the witness refuses to answer more than two questions it may be necessary to disregard his entire statement. There was a tendency to be more strict on the written interrogatories of depositions on the Chancery model because the deponent could not be coerced, and there was less chance to probe the witness further and investigate the motive of the refusal and the materiality of the loss of evidence.<sup>26</sup>

In the event that the witness gives "non-responsive" answers to written interrogatories, the rest of the questions intended to cross-examine him will be useless.<sup>27</sup> Much depends on the materiality of the answer, the facts known to the cross-examiner, and the tenor of the cross-interrogatories, so there are no fixed rules.

If the questions on direct examination are too general the cross-examiner cannot anticipate what to ask. The trial judge, suggests Wigmore, should have discretion to strike such testimony to prevent injustice.<sup>28</sup>

Roberti<sup>29</sup> observes that proof by witnesses is full of dangers, whether because of bad faith, or because of the fallible memory of men. Legislators, he says, have, therefore, tried to surround it with manifold precautions. Many authors, however, he observes, think that the greatest precaution is to be found in leaving the judge entirely free in interrogating the witnesses and in weighing the evidence, and in having him examine them directly so that he can penetrate their minds and critically distinguish the false from the true.

<sup>26</sup> Cf. Wigmore, *op. cit.*, § 1391. This may occur, at Canon Law, in the case of "rogatory commissions."

<sup>27</sup> Cf. Wigmore, *op. cit.*, § 1392.

<sup>28</sup> Where the judge controls the examination in its entirety and decides without a jury, as at Canon Law, this is not such a problem.

<sup>29</sup> *Op. cit.*, II-1, at 41.

Hearsay testimony, then, proceeds thus: A, on the witness stand, says: "B told me that event C occurred." A is testifying to what he knows, i.e. that B said event C occurred, and A, we assume, is telling the truth. The purpose of the testimony, however, is to prove that event C occurred, and this by B's assertion through A's assertion. All that witness A really proves is that B said a certain thing. What is sought to be proved is the occurrence of event C, and this by the statement of B made out of court, yet offered testimonially for the same purpose as if B were now saying it in court. As Bentham says: "It is of the essence of hearsay evidence to present to the notice of the judge two distinct persons in the character of witnesses."<sup>30</sup>

It is not a simple case of testifying to what one knows through auditory perception, e.g. when one hears, through a thin wall, two persons engaged in fornication or adultery.<sup>31</sup> It is likewise not a case of testifying to "verbal acts," e.g. an oral contract,<sup>32</sup> or a confession made in the presence of those who were summoned to hear it. There are certain cases in which one understands better through hearing than through seeing, e.g. in a case of perjury.<sup>33</sup>

It is true, that when A testifies that B, who has since lost his voice, said that he wanted to receive baptism or the sacrament of penance, he is giving "hearsay testimony," but this is not a matter of judicial testimony, and it is admitted to allow those sacraments to be administered.<sup>34</sup>

As Reiffenstuel says,<sup>35</sup> a witness *ex auditu auditus*, or, as

<sup>30</sup> Bentham, *Rationale of Judicial Evidence* (1827), bk. VI, c. IV.

<sup>31</sup> Cf. Glossa ad v. *De auditu*, in c. 27, X, *de testibus et attestationibus*, II, 20.

<sup>32</sup> Cf. Glossa ad v. *Indicavit*, in c. 8, C. XXII, q. 5.

<sup>33</sup> Cf. Glossa ad v. *Audierunt* in *De his, Casus*, in c. 15, C. III, q. 9; cf. also c. 8, C. XXII, q. 5.

<sup>34</sup> Cf. Glossa ad v. *Audierunt*, in c. 15, C. III, q. 9; cf. also c. 7, C. XXVI, q. 6.

<sup>35</sup> *Op. cit.*, II, 20, 346.

others say, *ex auditu alieno*, is one who under oath deposes that he heard those matters narrated by men worthy of belief. Such hearsay witnesses, he observes, are not really and properly to be called witnesses. A witness must depose as to that which happened, or which was said, in his presence. A hearsay witness is not such a witness, it is clear. Hence, in the old Canon Law they were called witnesses "*praeter communem formam*," and a sentence based upon their testimony did not become *res judicata*, but, when the truth was known through other witnesses who gave a better deposition, could always be withdrawn.<sup>36</sup>

The Hearsay Rule, at Common Law, is not based merely on the risk of incorrect transmission, for it is applied to documentary<sup>37</sup> as well as oral evidence. It is not based on an "inherent weakness" in the testimony itself, though that is sometimes put forward as an argument for not accepting the testimony. It is not based, really, on "lack of personal knowledge," for the witness who repeats the statement in court has personal knowledge of what he heard and the one who made the original statement spoke, we assume, from his own personal knowledge. The witness on the stand is, however, not a witness to the ultimate fact,<sup>38</sup> of which, of course, he lacks personal knowledge. Finally, hearsay is not objectionable as an "anonymous utterance or rumor," for that sort of statement would be excluded on other grounds, *viz.*, the author is not shown qualified, by knowledge or otherwise.<sup>39</sup>

<sup>36</sup> *Op. cit.*, II, 20, 347, 344.

<sup>37</sup> Cf. Glossa ad v. *Scripturam*, in c. 15, C. III, q. 9, where it is said that letters of a bishop have no force when it is a matter of giving testimony, because one is to believe witnesses, not testimonials; cf. c. 8, X, *de cohabitatione clericorum et mulierum*, II, 2; c. 20, C. XI, q. 3; *Corpus Iuris Civilis*, ed. stereotypa quinta decima, Vol. I, *Institutiones*, recognovit Paulus Krueger, *Digesta*, recognovit Theodorus Mommsen, retractavit Paulus Krueger (Berlin, 1928) [hereinafter cited in the following style], D.48.3.3. Outside of trials it was different, cf. c. 20, C. XI, q. 3.

<sup>38</sup> Cf. Wernz-Vidal, *op. cit.*, VI-1, at 425.

<sup>39</sup> Cf. Wigmore, *op. cit.*, § 1363; Can. 1783, 2°.

Hearsay assumes the declarant was qualified as a witness<sup>40</sup> and still rejects his testimony because he is not present to be cross-examined.<sup>41</sup> This is the real reason, says Wigmore, for the exclusion of hearsay in the courts of law, that it cannot be subjected to the fundamental tests of cross-examination<sup>42</sup> and confrontation.<sup>43</sup>

The history of the Hearsay Rule, at Common Law, began in the 1500s. It was completely formulated by the early 1700s. To understand the rule it is necessary to keep clearly in mind the distinction between the requirement that an extra-judicial speaker be called to the stand to testify and that one already on the stand speak from personal knowledge.<sup>44</sup> A very old rule, going back to the custom of "compurgation"<sup>45</sup> likewise

<sup>40</sup> Reiffenstuel, *op. cit.*, II, 20, 379, notes that when, by exception, hearsay testimony is allowed the witness must have heard the matter from those who are not infamous or suspect, but worthy of credence, for it would be absurd to admit those witnesses whose sources would have been rejected. He who has heard something from others cannot surpass the trustworthiness of those from whom he heard it and whose words he repeats.

The Glossa ad v. *De causis*, in c. 37, X, *de testibus et attestationibus*, II, 20, discusses whether the witness is bound to make known the fact that he has been convicted, is a perjurer, or such as is not permitted to testify. These are circumstances which are investigated, and a witness in a criminal case and an ordinand are put on the same plane, and the ordinand is bound to manifest his crimes. On the other hand, one is not bound to betray himself. This latter rule, says the Glossator, has to do with one who is confessing in the tribunal of penance, who is not bound to confess publicly his occult crime. He concludes that the witness must at least answer concerning the points mentioned, but concerning others, if he is asked, he is not bound to answer, though it is not customary to ask witnesses about such other matters. The rules are not to be given an extended, but rather a restricted, interpretation.

<sup>41</sup> Cf. Wigmore, *op. cit.*, § 1363.

<sup>42</sup> Cf. Wigmore, *op. cit.*, § 1362.

<sup>43</sup> Cf. Wigmore, *op. cit.*, § 1365; Can. 1772, §§ 2-3.

<sup>44</sup> Cf. Wigmore, *op. cit.*, § 1364.

<sup>45</sup> Cf. Reiffenstuel, *op. cit.*, II, 20, 353. Cf. also Hobhouse, *Morals in Evolution*, (5. ed., 1923), at 114 ff.; *Anglo-Saxon Laws of Oaths* (probably ante 925 A.D.), §§ 4-11, translated in Thorpe, *Ancient Laws and Institutes of England*, Vol. I, at 181-183, contains examples of the "companion's oath who stands with him."

required a distinction between the "oath-helper" (similar to the *testis septimae manus*)<sup>46</sup> and the witness (*testis*). The witness swore to what he personally *knew* about the fact in issue from his own observation, speaking *de visu suo et auditu*, while the oath-helper swore that he *believed* that the party for whom he swore was in the right, and was telling the truth. In this matter of hearsay we are dealing not with an oath-helper, nor with a witness testifying to what he saw or heard personally, but with a declarant who is not present in court and whose statement made out of court is now repeated by another who heard him say it.

In the 1500s it was just beginning to be the custom to have witnesses inform the jury of the facts of the case.<sup>47</sup> Prior to this time the jury, or rather the court, was composed of people who already knew the facts,<sup>48</sup> the old Norman type of "*jurati*" who were primarily summoned in tax matters to say from their own knowledge, what a man's tax should be.<sup>49</sup> When the jury came to depend upon witnesses, rather than upon its own knowledge, it became important to know not only whether there were enough witnesses, but also what was the value of the testimony which they offered. The Civil and Canon Law had rules<sup>50</sup> as to the number necessary in

<sup>46</sup> Cf. Can. 1975.

<sup>47</sup> Cf. Wigmore, *op. cit.*, § 1364.

<sup>48</sup> Cf. Maitland, *Constitutional History of England* (1908), at 105; Adams, *The Anglo-Saxon Courts of Law*, in *Essays in Anglo-Saxon Law* (1876), at 1, 2-3. It was "trial by witnesses" rather than "jury-trial." The idea of convicting an accused person on the basis of the knowledge of the judge, i.e. of the court, had already been rejected, at Canon Law, cf. c. 2, C. XV, q. 5, where St. Nicholas the Great (858-867) asked how the bishop could know that the priest or deacon was guilty unless he confessed or was lawfully convicted on the assertion of an accuser and of the canonical number of witnesses. C. 19, C. II, q. 1, a quotation, originally, from Sermon 351 of St. Augustine (354-430), says that a sin which is known to the judge alone cannot be condemned by him.

<sup>49</sup> This is the type of "*juratus*" reflected in the manual of Regino of Pruem (+ 915), *Libri duo de synodalibus causis et disciplinis ecclesiasticis* (ed. Wasserschleben, 1841).

<sup>50</sup> Cf. Roberti, *op. cit.*, II-1, at 72.

given cases and the circumstances sufficient to complement and corroborate testimony deficient in numbers. Many appeals were made to those rules by the lawyers but they made no permanent impression on Anglo-American Law, save in treason and perjury cases. The general notion, however, thoroughly permeated the times<sup>51</sup> and they barely escaped being incorporated in the jury system. They did raise a question regarding the use of information from persons not produced.

When the verdict came to depend so much on what was laid before the jury at the trial, and when the sufficiency of evidence in quantity and quality began to be canvassed, it came to be asked whether a hearsay laid before them would suffice. Thus, it was asked: If one testifies in court from personal knowledge and another's hearsay is offered, will the two together suffice? The notion of quality, as associated with hearsay, is seen also in certain coeval rules on the Continent, e.g. one witness on personal knowledge is equivalent to two

<sup>51</sup> Cf. c. 15, C. III, q. 9, in which Callistus (217-222) is presented as stating that witnesses are not to testify in writing, in criminal cases, but are to be present. They are to testify truthfully as to what they know, and have seen. They are not to give testimony as to other cases or as to other matters than those which occurred in their presence. This "letter to the Bishops of Gaul" is one of the famous forgeries of Pseudo-Isidore (9th c.) which grew out of the aspirations of men for a better treatment in the courts and which were accepted into the *Corpus Iuris Canonici*, partly because they were believed to be authentic, until exposed by Torquemada (+ 1468) and Nicholas Cusanus (+ 1464), partly because they did soften the rigors of procedure in criminal cases at the time.

Gratian's notation following this chapter indicates that in civil cases witnesses were permitted to testify as to what they had heard, referring to the *Authenticum*, coll. 7, cf. *Corpus Iuris Civilis*, ed. stereotypa quinta, Vol. III, *Novellae*, recognovit Rudolphus Schoell, absolvit Guglielmus Kroll (Berlin, 1928), Nov. 90, c. 5.

The Glossa ad v. *Sed praesentes*, in c. 15, C. III, q. 9, says that in a criminal case the witnesses will always be present, but in a civil case the custom of the place is to be observed, cf. D.22.5.3.6.

This distinction, between the rule in civil and that in criminal cases, seems not to have made much impression on the English lawyers with their "tort approach," at least prior to Slade's case.

or three going on hearsay.<sup>52</sup> Though there was a tendency to exclude hearsay there was still, at that early stage, a certain contrary tendency to allow it as confirmatory or corroboratory of other testimony offered.<sup>53</sup>

In 1690, in Sir Walter Raleigh's trial for treason it was said that there was no rule to produce the person of the accuser, *ex parte* depositions were still allowed, though sentiment was crystallizing against this course of procedure. Such procedure in a criminal case, especially one involving capital punishment, would have shocked a Canonist or a Civilian. At Canon Law, hearsay was allowed in defense of the accused,<sup>54</sup> not against him.<sup>55</sup> At Roman Law, it was provided that in criminal cases witnesses were by all means to be presented before the judges and were to state what they knew. Justinian observed that there might be occasion to torture them, as well as subject them to every other kind of observation.<sup>56</sup>

The Canon Law made a distinction between "conviction," mentioned above, and "denunciation." In the latter case less proof was required.<sup>57</sup> "Denunciation" was also distinguished from "indication." "Denunciation" concerned crimes already committed, e.g. a marriage entered though forbidden by law. This was also called "canonical denunciation" and was always proper, while "indication" was not. "Indication" meant that one person indicated to another that someone intended to commit a sin, and concerned crimes yet to be committed, e.g. a marriage to be entered though forbidden by

<sup>52</sup> Cf. Pertile, *Storia del Diritto Italiano* (2. ed., 1900), Vol. VI, pt. 1, at 388; Esmein, *Histoire de la Procedure Criminelle en France* (1882), at 269, 369. This is the "arithmetical computation" of Germanic origin, mentioned by Roberti, *op. cit.*, II-1, at 72.

<sup>53</sup> Cf. Reiffenstuel, *op. cit.*, II, 20, 371, *supra*, n. 3.

<sup>54</sup> Cf. Reiffenstuel, *op. cit.*, II, 20, 368.

<sup>55</sup> Cf. Glossa ad v. *Sed praesentes*, in c. 15, C. III, q. 9, *supra*, n. 51.

<sup>56</sup> Cf. Nov. 90, c. 5.1 (539). The Glossa refers to this law.

<sup>57</sup> Cf. Glossa ad v. *Indicavit*, in c. 8, C. XXII, q. 5, arguing from c. 12, X, *de sponsalibus et matrimoniis*, IV, 1; c. 3, X, *de successionibus ab intestato*, III, 27; c. 37, X, *de testibus et attestationibus*, II, 20.

law. Those alone, said the Glossator, who were in a position of authority were bound to take cognizance of the "indication," which was called "denunciation according to the Gospel."<sup>58</sup>

Later, from 1675-1690 on, the rule of exclusion became more and more rigid. The deponent was usually present, his sworn statement was read, and he confirmed it as voluntary, i.e. not made under torture. Hearsay was still recognized as confirmatory or corroboratory, a survival of the idea of sufficiency and quantity. The rule developed that there should be no condemnation on hearsay.

Still later, it became evident that rigid exclusion was not an entirely practical rule. Counsel had begun to be allowed to cross-examine, i.e. the accused had begun to be allowed to make a full defense, instead of hoping that the prosecution would fail to make out a case against him. Counsel was allowed to cross-examine in cases of treason from about 1695 on, and in felony cases from 1836 by rule, though the practice had begun earlier. The ecclesiastical courts in England had begun to require the production of witnesses by the middle 1600s, somewhat later than those on the Continent.

<sup>58</sup> Cf. Glossa ad v. *De auditu*, in c. 27, X, *de testibus et attestationibus*, II, 20, arguing from c. 2, X, *de sponsalibus et matrimoniis*, IV, 1; c. 2, X, *de consanguinitate et affinitate*, IV, 14. The Glossa explains that that which does not exist cannot be "accused" but can be "denounced," i.e. the marriage can be prevented, arguing from c. 13, X, *de desponsatione impuberum*, IV, 2.

Less evidence is required to indict (Fr. *inditer*, indicate, show, point out) than to convict. Evidence that some action should be prevented need not be as strong as that required to make out a probable case against one who is to be tried for a crime committed. Cf. Can. 2307, as to the canonical *monitio* given to one who is in the proximate occasion of committing a delict. The proofs must be stronger to warrant institution of criminal proceedings; cf. Can. 1946 as to the outcome of the "inquisition."

Care must be taken, however, with regard to this "lesser proof needed" concept, lest it degenerate into the "protective custody" of the "Police-State." Cf. Best, "Die Geheime Staatspolizei", 6 *Deutsches Recht* (1936), at 125-126. Compare *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 60 S. Ct. 523, 84 L. Ed. 744, 126 A.L.R. 530 (1940), upholding proceedings under Chap. 369 of the Laws of Minnesota of 1939 concerning commitment of a "psychopathic personality."

Gradually there has been a relaxation of the rule of exclusion. At least the relaxation has been allowed where necessity requires it and the trustworthiness of the testimony obtained from others is assured. The popular conception of the complete lack of value in hearsay testimony reflects the stage of rigid exclusion, but the courts have, of necessity, come to consider the fact that it is hearsay rather as a factor to be weighed in determining the value of the evidence, much as does Can. 1789.

Thus, for example, the courts have come to be more generous in admitting depositions<sup>59</sup> and testimony given in former trials of the case, if the issues and parties are the same.<sup>60</sup> The taking of depositions in civil cases was allowed, at Roman Law, from the time of Hadrian (117-138)<sup>61</sup> who decreed that witnesses were not rashly to be called upon to undertake a long journey. Soldiers were even less to be called away from their posts for the sake of giving testimony. It was up to the judge, commented Callistratus, to find out the custom of the province in which he presided. If it appeared that persons were often called in considerable numbers to testify in another city, they were to be called by him if they were necessary in the investigation of the case which he was deciding. Greater freedom to use depositions in civil cases was granted by Justinian, in 539.<sup>62</sup> At Canon Law, Innocent III (1198-1216) decreed that depositions were to be taken to relieve the parties of the burden of producing the witnesses before him in a civil case.<sup>63</sup>

<sup>59</sup> Cf. *Rules of Civil Procedure for the District Courts of the United States* (Washington, 1939), Rules 26-31 and notes; *Rules of Criminal Procedure for the District Courts of the United States* (Washington, 1945), Rule 15 and notes. Depositions, of course, give an opportunity for cross-interrogatories.

<sup>60</sup> Cf. Wigmore, *op. cit.*, § 1336. The cross-examination, in such cases, took place in the former trial.

<sup>61</sup> Cf. D.22.5.3.6.

<sup>62</sup> Cf. Nov. 90, c. 5.

<sup>63</sup> Cf. c. 37, X, *de testibus et attestationibus*, II, 20.

The courts have relaxed the rule of exclusion of hearsay on the simple principle of necessity, i.e. the absence of any other means of utilizing the witness' knowledge. If his testimony given anew in court cannot be had, it will be lost entirely for the purpose of doing justice if it is not received in the form in which it survives and can be had.

Specific cases of unavailability of the witness are: 1) death; 2) absence from the jurisdiction; 3) disappearance, inability to find him; 4) opponent's procurement of disappearance; 5) illness, infirmity, age, preventing attendance.<sup>64</sup> Attendance may also be prevented by: 6) imprisonment; 7) official duty or privilege; 8) distance of travel; 9) insanity or other mental incompetency; 10) disqualification by interest or privilege in the cause; 11) disqualification by infamy.<sup>65</sup>

Depositions in such cases are taken before an officer or other person authorized by law, after a preliminary order to take them. Personal attendance of the witness must be shown to be impracticable. The deposition must be transmitted in writing, according to the prescribed mode of transmission, filing, and opening.<sup>66</sup> They are not merely statements under oath, for the opposing party must have an opportunity for cross-examination.<sup>67</sup>

That the death of a witness may make it necessary to accept what he has previously deposed<sup>68</sup> or has testified in a former trial is clear.<sup>69</sup> That is the only way in which his

<sup>64</sup> Cf. Wigmore, *op. cit.*, §§ 1403-1406.

<sup>65</sup> Cf. Wigmore, *op. cit.*, §§ 1407-1410.

<sup>66</sup> Cf. Wigmore, *op. cit.*, § 1376; Can. 1770, § 2, 3°, 4°; 1570, § 2.

<sup>67</sup> Cf. Wigmore, *op. cit.*, § 1377.

<sup>68</sup> Cf. Can. 1730. Innocent III introduced the *examen ad futuram rei memoriam* into the Canon Law (cf. c. 5, X, *ut lite non contestata non procedatur ad testium receptionem vel ad sententiam definitivam*, II, 6) with the limitation that if suit were not started within a year the deposition should lose its force. Cf. also Roberti, *op. cit.*, II-1, at 77-79; Wernz-Vidal, *op. cit.*, VI-1, at 427-428.

<sup>69</sup> Reiffenstuel says (*op. cit.*, II, 20, 372) that the presumption arising from hearsay is allowed when the persons from whom the witnesses heard the

knowledge can be used by the court to achieve justice in the particular case. He cannot now be called to the stand to testify in the presence of the court, and if his statement is rigidly excluded for that reason, it will be lost entirely.

Absence from the jurisdiction is not such a problem for the Canonist,<sup>70</sup> with his "rogatory commissions,"<sup>71</sup> as it is for the lawyer who cannot compel attendance of a witness who has moved beyond the jurisdiction of the court. Here the lawyers make a distinction between permanent and temporary removal. In the former case, they consider that the witness is unavailable and that the hearsay rule is to be relaxed, to allow the use of his testimony at a former trial and of depositions

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matter are already dead. Were they still alive the presumption would not arise. Indeed, there would rather arise a suspicion against the one who produced only such hearsay witnesses when he could produce the very persons who had previously said it.

<sup>70</sup> Reiffenstuel (*loc. cit.*, *supra*, n. 69) says that the presumption from hearsay is allowed when the persons from whom the witness heard the matter are far away. If they are available, the same suspicion arises from the failure to produce them as was indicated *supra*, n. 69.

<sup>71</sup> Cf. Can. 1770, § 2, 3°, 4°; Can. 1570, § 2. Wigmore (*op. cit.*, § 1383, 2, c) speaks of "letters rogatory," which the other court answers on the basis of comity, in keeping with the "compartmentized" organization of the Anglo-American judicial system. At Canon Law, the obligation of the other court to respond is imposed by the general law, in keeping with the "universal" organization of the ecclesiastical judicial system.

To speak of evidence obtained through a "rogatory commission" as "hearsay" causes a Canonist to raise his eyebrows, for he sees it as nothing more or less than court testimony obtained by one of the various courts in the ecclesiastical judicial system. Accustomed as he is, and as was the Chancery Court in England, to take all evidence in writing and thus present it to the court in the form of written depositions, with no requirement of *viva voce* testimony on the trial (cf. Wigmore, *op. cit.*, 1417 [1]), he simply adds the testimony obtained through the "rogatory commission" to the record on which the sentence is based.

The system mentioned by Wigmore is similar to that of the taking of evidence by an *Auditor*, at Canon Law; cf. Can. 1580-1583. Roberti (*op. cit.*, II-1, at 41) notes, however, that it is better if the judge hears the witnesses personally, rather than through an *auditor*. In such a case, the judge, as he questions the witness himself, is certainly getting *viva voce* testimony, which is recorded (cf. Can. 1585, 1642) for his use in giving the sentence (cf. Can. 1869, § 2) and for the use of the Court of Appeal (cf. Can. 1890).

taken from the witness. In the latter case, they simply postpone the trial until he returns.

The disappearance of the witness, with subsequent inability to find him, also serves to justify a relaxation of the rule of exclusion, at least to the extent that his former testimony or deposition may be used. The lawyers require a showing of a diligent search which has failed to uncover the missing witness. They also are on the alert for the possibility of collusion between the party who seeks to use the testimony and the witness who has disappeared and cannot now be cross-examined.<sup>72</sup> It is suggested that these cautions would also stand the Canonist in good stead. Why is the "some one else" not produced by the party? Has a diligent search for him been made? Has there been any collusion in his disappearance?

When the disappearance of the witness has been procured by the opposing party there is less difficulty in admitting what he deposed or testified to. After all, no one should profit by his own wrong<sup>73</sup> and to exclude the statement of the absent witness would benefit the one who procured his disappearance, else why should he procure it?

Illness, infirmity, age, etc., preventing the attendance of the witness are provided for in Can. 1770, § 2, 2°.<sup>74</sup>

When attendance of the witness is prevented by imprisonment, assuming that he is not imprisoned in a place whence

<sup>72</sup> Cf. Reiffenstuel, *op. cit.*, II, 20, 372, *supra*, nn. 69, 70.

<sup>73</sup> Cf. D.50.17.134.1.

<sup>74</sup> Cf. Glossa ad v. *Valetudinarii*, in c. 8, X, *de testibus et attestationibus*, II, 20. There it is said that the judge must send to those persons who are prevented from attending by reason of such infirmity, or old age, or to the judge of the place where they reside that he may hear them and transmit their words under seal to the judge presiding in the case, arguing from Nov. 90, c. 5. Such witnesses can be heard, the Glossa adds, even before joinder of issue, *lite non contestata*, referring to c. 5, X, *ut lite non contestata non procedatur ad testium receptionem vel ad sententiam definitivam*, II, 6; cf. also Can. 1730. The Glossa further asks whether old persons are to be compelled to testify if they are unwilling, and concludes that they are, according to the canons, because of sin.

the officials can conduct him to court to testify, his former testimony and depositions can be used, by relaxation of the hearsay rule. It is suggested, however, by Wigmore, that a new deposition would be better. This sort of situation is covered by the words of Can. 1770, §2, 2°, “ . . . *corporis* . . . *impedimento* . . . ” it seems, allowing a rogatory commission to issue.<sup>75</sup>

Official duty or privilege as affecting the relaxation of the hearsay rule has its analogue in the provision of Can. 1770, § 2, 1°, as to Cardinals, Bishops, and illustrious personages who by the law of their country are excused from appearing in court.<sup>76</sup>

Distance of travel, as requiring the relaxation of the hearsay rule for depositions, has likewise its analogue in Can. 1770, § 2, 3°, 4°. The other judge, or the “priest nearby,” takes the testimony and transmits it to the court.<sup>77</sup>

Insanity or other mental incompetency<sup>78</sup> subsequent to the making of the deposition or the giving of the testimony in the former trial, due to disease, or senility, or loss of speech, sight, or memory, is also to be considered in relaxing the exclusionary provisions of the hearsay rule, to allow the acceptance of former statements even though the witness, still living, is not put on the stand for cross-examination. Were this not done, his knowledge of the facts of the case would be lost to the court.<sup>79</sup>

<sup>75</sup> Cf. Roberti, *op. cit.*, II-1, at 57.

<sup>76</sup> Cf. Glossa ad v. *Valetudinarii*, in c. 8, X, *de testibus et attestationibus*, II, 20. The Glossa argues this from D.12.2.15, a quotation from Paulus, saying that one must send to outstanding personages and to those who are prevented by illness that they may be sworn at their homes. Eugene III (1145-1153) extended the privilege to those who were ill, and old, or weak, or oppressed by poverty, so that they could not be produced in court; cf. c. 8, X, *cit. supra*.

<sup>77</sup> Cf. Nov. 90, c. 5, *supra*, n. 62; and D.22.5.3.6, *supra*, n. 61.

<sup>78</sup> Cf. Can. 1757, § 1.

<sup>79</sup> Cf. Can. 1730, “ . . . *ob aliam iustam causam* . . . ”

Disqualification by subsequent interest or privilege in the cause is also to be considered in relaxing the rule. It may well happen that a person who had knowledge of the facts and who made a deposition or testified about them at a former trial has subsequently acquired such an interest in the *res* that he is no longer to be admitted as a witness at the present time.<sup>80</sup> Should this prevent the use of his former statements about the facts in the case?

Similarly, disqualification by infamy,<sup>81</sup> incurred subsequent to making the deposition or testifying at the former trial may make the person a "suspect" witness at the present time,<sup>82</sup> so that he should not be heard, or should be heard unsworn and his testimony given but adminiculative force.<sup>83</sup> This does not necessarily prevent the use of depositions or testimony he gave prior to incurring the infamy.

It is apparent from the foregoing that the Hearsay Rule is not absolute. Its relaxation in the cases in which testimony given formally out of court can be admitted is sufficient to show that the courts require the rule to yield to the exigencies of given cases. The necessities of the case even justify a witness in reporting statements of those who do not appear as witnesses in the trial. The permissibility of the admission of such testimony is recognized in regard to fourteen different types of reported statements. It will be the province of Part II of this paper to discuss in detail these fourteen exceptions to the Hearsay Rule.

<sup>80</sup> Cf. Can. 1757, § 3, 1°.

<sup>81</sup> Cf. Can. 2293.

<sup>82</sup> Cf. Can. 1757, § 2, 1°.

<sup>83</sup> Cf. Can. 1758.

## ATTENDANCE OF PRIESTS AT DANCES\*

### PART I. THE PERTINENT LEGAL ENACTMENTS

THE subject matter of this article will deal especially and for the most part with the particular legislation of the Plenary Councils of Baltimore II and III, and certain decrees of the Holy See in respect to Baltimore legislation concerning the attendance of priests (and clergymen generally) at dances.

#### I. THE LAW OF *The Code of Canon Law*

*The Code of Canon Law* deals directly and clearly with this subject. Canon 140 states that clerics shall not attend dances which for them are unbecoming, or at which their presence may be a source of scandal.<sup>1</sup> Manifestly, clerics are hereby not forbidden absolutely to be present at all dances, but only at those in which we find the elements just stated in the law of the Code.<sup>2</sup> It is apparent, however, that this law is laid in very general terms. Hence it is admittedly difficult to state as a general rule—hardly possible, in fact,—what in particular is to be considered as prohibited, unless this question is decided by respective local legislation.<sup>3</sup> At all events, the conditions of impropriety or scandal laid down in canon 140 re-

\*This article is to be published in two parts. The first part presents the law affecting the subject as it is found in the Code, in the legislation of the III Plenary Council of Baltimore, and the pronouncements of the Holy See. The second part will appear in the April 1951 issue of *THE JURIST*. It will be devoted to a discussion of the commentaries touching upon the legal enactments and to conclusions which seem justified in the opinion of the writer.

<sup>1</sup> “. . . choreis . . . quae eos dedecent, vel quibus clericos interesse scandalosum sit, praesertim in publicis theatris, ne intersint.”

<sup>2</sup> “Etiam hic prohibitio est hypothetica.”—Iorio, *Theologia Moralis*, 3. ed. (3 vols., Neapoli: M. D’Auria, 1946), II, n. 1028, 2°.

<sup>3</sup> Beste, *Introductio in Codicem*, 3. ed. (Collegeville, Minn.: St. John’s Abbey Press, 1946), p. 194.

solve themselves in questions of fact. Whenever either of them is fulfilled, canon 140 is operative in its prohibition. Moreover, it is clear that the residential Bishop and the provincial or plenary Council can in effect determine the question of fact by particular legislation.<sup>4</sup> Such legislation may, in fact, be more severe than the law of the Code.<sup>5</sup> Hence, as far as the legislation of the Code is concerned, one may expect that particular local or special statute will determine the type of such entertainment at which it is in fact improper for the clergy to be present.<sup>6</sup> It may be noted here that the Code in canon 140 enacts a standard of impropriety, not as applicable to the faithful in general, but to the clergy *in specie* (*quae eos dedecent*). The impropriety apparently here envisioned is all such as detracts from the clerical state the honor and respect due to it.<sup>7</sup> What the object of impropriety is which has this effect must in particular instances be judged from the character of the entertainment itself, from the reputation which particular forms of diversion enjoy among the people, and from the repute which attaches to the respective place.<sup>8</sup> It is fundamental that many things, which are permissible to the faithful generally to engage in, are improper for the clergymen as derogatory of the esteem and honor proper to their ecclesiastical dignity.<sup>9</sup> The same considerations are referable to their presence at types of entertainments which may be a source of scandal.

<sup>4</sup> Cf. Beste, *loc. cit.*

<sup>5</sup> Coronata, *Institutiones Iuris Canonici*, 2. ed. (Taurini: Marietti, 1939), I, n. 199, in fine.

<sup>6</sup> Wernz-Vidal, *Ius Canonicum*, 2. ed. (Romae: Apud Aedes Universitatis Gregorianae), II, *De Personis*, n. 122.

<sup>7</sup> Beste, *loc. cit.*

<sup>8</sup> Cf. Beste, *loc. cit.*

<sup>9</sup> Wernz-Vidal, *Ius Canonicum*, II, n. 199; "Celebre inter SS. Patres axioma habet, multa quae fidelibus licent clericos dedecere."—*Acta et Decreta Concilii Plenarii Baltimorensis Tertii* (Baltimore: Typis Joannis Murphy et Soc., 1886), n. 79.

In regard to the clergy of the United States of America, the Second Plenary Council of Baltimore (1866) enacted legislation explicitly and without qualification forbidding the presence of clerics at dances.<sup>10</sup> The Third Plenary Council of Baltimore (1884) did not enact a like explicit and unqualified prohibition.<sup>11</sup> This Council, however, made provision for the continuance of legislation of the Second Plenary Council, except those enactments abrogated or changed by the Third Plenary Council.<sup>12</sup> Hence, it would seem that the latter Council wished to continue in effect the prohibition of the Second Plenary Council in respect to the presence of the clergy at dances. Among the post-Code authors writing in the United States and commenting on canon 140, Barrett seems to be the only one who points to the above stated enactment of Baltimore II. However, Barrett, though not singling out dances specifically, observes in respect to this enactment (II Balt. n. 153) and Decree n. 79 of the Third Plenary Council, quoted above, that “. . . as canon 29 states, custom is the best interpreter of the law, and it seems that the American clergy have never strictly interpreted these decrees of the Councils, but have always understood them to mean practically the same as is now expressed in canon 140.”<sup>13</sup> The presence of a custom as proposed by Barrett may thus explain why other American authors, in commenting on canon 140 concerning the presence of the clergy at dances, do not introduce the enactment of the Second Plenary Council on this subject. Indeed, the statement of Barrett seems correct and

<sup>10</sup> “Ludis scenicis, spectaculis, choreis ne intersint.”—*Concilii Plenarii Baltimorensis II, Acta et Decreta*, ed. altera (Baltimore: Joannes Murphy, 1894), n. 153.

<sup>11</sup> This Council enacted in its Decree n. 79: “Itaque ut ecclesiastico ordini honor suus et decus servetur, mandamus ut sacerdotes a publicis equorum prorsus abstineant cursibus, a theatris et spectaculis.”

<sup>12</sup> *Acta et Decreta Conc. Pl. Balt. III*, Titulus Prævius, in fine.

<sup>13</sup> Barrett, *A Comparative Study of The Councils of Baltimore and The Code of Canon Law* (The Catholic University of America Canon Law Studies, n. 83, Washington, D. C.: The Catholic University of America, 1932), p. 53 (cited hereafter: *A Comparative Study*).

directly applicable at the present time to the former absolute prohibition of Baltimore II in respect to the presence of clergymen at dances, as a general rule. Hence, as regards their presence at dances generally, the prescript of canon 140 is, in effect, the norm governing the conduct of the American clergy in the United States, besides, of course, any particular local, e.g., diocesan, or special legislation. Yet even in the absence of such more specific legislation, the provision of canon 140 would be operative, of course, not only in respect to matter objectionable for the clergy as to its substance, but also,—though not objectionable in substance—yet objectionable as to circumstances of place and time, and of public repute<sup>14</sup> even in a particular locality<sup>15</sup> in respect to the attendance of clergymen. Thus public opinion may make the presence at dances—otherwise unobjectionable—taboo for the clergy because of unfavorable comment and wonderment from the part of upright and prudent laymen, which result would be understood under the head of scandal mentioned in canon 140. It may well be noted here, however, that public opinion may also have the reverse effect; namely, that as to the propriety of attendance, it may change with time, so that what was considered unseemly in the past is held not censurable in public opinion at the present time.<sup>16</sup>

However, this general rule of canon 140 has been variously understood to be modified in respect to the clergy of the United States; namely, by reason of Decree n. 290 of the Third Plenary Council of Baltimore and two pronouncements of the Sacred Consistorial Congregation in regard to this Decree. These legislative enactments beget a further question in respect to the clergy of the United States, which has considerable practical import—the question of the participation of the clergy in the employment of, and their presence at, dances conducted by the parish or by others for its benefit or

<sup>14</sup> Beste, *Introductio in Codicem*, p. 194.

<sup>15</sup> Ramstein, *A Manual of Canon Law* (Hoboken, N. J.: Terminal Printing & Publishing Co., 1948), p. 181.

<sup>16</sup> Ramstein, *loc. cit.*

other pious cause, either as separate undertakings or in conjunction with some "parish social," held usually to obtain funds for such pious purpose; or, dances conducted, without benefit to a pious cause, but simply and merely as social affairs by groups of Catholics as such, which groups may or may not have affinity with any particular parish, e.g., a dance conducted by some group which is a parish society, or one held by Catholics of one or several parishes, or one engaged in by the students or student society or club of a Catholic institution of learning, high school or college, all merely as social entertainment. The stated Decree of the Third Plenary Council of Baltimore and the pertinent pronouncements of the Holy See in regard to such dances and especially in regard to the relation of the clergy to them will be the object of the discussions to follow.

## II. DECREE N. 290 OF THE THIRD PLENARY COUNCIL OF BALTIMORE, (1884)

The matter of holding dances by Catholic groups or under Catholic auspices and the relation of priests thereto has in the past, during more than fifty years, been the subject of comparatively frequent discussion and comment, as appears in some ecclesiastical periodicals published in the United States, cited in the following pages. These observations are based upon Decree n. 290 of the Third Plenary Council of Baltimore and two Decrees of the Sacred Consistorial Congregation issued in the years 1916 and 1917, which latter Decrees will be treated subsequently. Likewise, American authors, and others also, dealing with canon 140 in regard to the conduct of clerics in respect to dances, cite this Decree of the Third Plenary Council and the two Decrees of the Holy See. After careful reading and study, the observations and comments on this particular legislation concerning the subject of clerics and dances, taken in the aggregate, seem to the writer to produce a maze of uncertainty and what seems to him to be unnecessary confusion as to just what this legislation prohibits. The uncertainty has been expressed by Woywod nearly fifty years

after the Third Plenary Council, to the effect that, "Whether the Council of Baltimore meant to forbid every kind of dance arranged by or for the parish, is not clear. The text speaks of banquets with balls. . . . Since the interpretation of the law of the Council of Baltimore is not the same in every diocese, it will be difficult to obtain uniformity in the matter we have here discussed."<sup>17</sup> The writer agrees that the issue on the question lies fundamentally in the meaning and extent of the law of Baltimore III and of the pronouncements of the Holy See incident thereto. It seems also that the question of the applicability of this legislation to the present time and conditions admits of examination and discussion.<sup>18</sup> It appears to the writer that the Decree of Baltimore III, especially when considered, as it must be, against the background of its juridic antecedents and the mentioned pronouncements of the Holy See, is clear as to its meaning and extent.

Decree n. 290 of the Third Plenary Council of Baltimore commands priests to direct their efforts to the complete abolition of that abuse whereby dinners are arranged in conjunction with dances—the conduct of balls—for the purpose of promoting pious works:

Mandamus quoque ut sacerdotes illum abusum, quo convivia parantur cum choreis (*Balls*) ad opera pia promovenda, omnino tollendum curent.<sup>19</sup>

As appears *prima facie* from its text and context, and as will be more apparent throughout the subsequent discussions, this law was not intended as a measure of general reform of Catholic society as such. Nor was it intended primarily to safeguard the proprieties demanded by the clerical state of

<sup>17</sup> "Dances of Benefit of a Parish,"—*The Homiletic and Pastoral Review* (cited hereafter: *HPR*), XXXII (1932), 1080. Similarly, cf. Donovan, (J. T.), *The Clerical Obligations of Canons 138 and 140* (cited hereafter: *Clerical Obligations*) (The Catholic University of America Canon Law Studies, n. 272, Washington, D. C.: The Catholic University of America Press, 1948), pp. 165-166.

<sup>18</sup> Cf. Part II, Cessation of the Baltimore Law, to be published in April issue of *THE JURIST*.

<sup>19</sup> *Acta et Decreta Conc. Pl. Balt. III.*

life (*de vita et honestate clericorum*). Rather, as the title itself under which this decree appears indicates, this law seeks to abolish the dance as a means, especially financial, to promote pious causes.<sup>20</sup> It is important to keep in mind that this law in its terms does not prohibit the dance employed for any purpose other than the advancement of a pious cause.<sup>21</sup>

The context of the decree reviews certain entertainments and forms of recreation employed to raise funds for pious uses, such as picnics, excursions, fairs, and the like.<sup>22</sup> These affairs and their attendant diversions the law places under the strict control of the Bishops, in order to obviate the occasions of sin and scandal, as stated in the text. The Council does not abolish these parish affairs. But in this context the law decrees the abolition of banquets in conjunction with dances, that is, balls, as a means of promoting pious causes. In effect, the law seeks to eliminate the use of the dance as a means to achieve such pious purpose. In this enactment the Council expressly followed the mind of a decree (n. 396) of the Second Plenary Council of Baltimore (1866), which decree had also sought to eliminate the occasion of sin, scandal, and other harmful elements from the means undertaken to promote church benefits.

The Second Plenary Council of Baltimore had already expressed its strong disfavor relative to the employment of festivities such as those mentioned above as a medium of raising funds for church uses, because they afforded direct occasion of sin and were a cause of public scandal, exposing Catholics to derision and opprobrium on the part of those out-

<sup>20</sup> Titulus IX.—*De Bonis Ecclesiasticis*. Caput V. *De Modis Prohibitis Pecunias ad Pias Causas Colligendi*. Cf. Donovan, *Clerical Obligations*, pp. 165-166.

<sup>21</sup> Cf. Donovan, *Clerical Obligations*, p. 166.

<sup>22</sup> "Plerisque in locis pecunia in pios usus haud exigua comparari solet per conventus quosdam, qui animorum oblectandorum causa fiunt, quique apud nos vulgo *Picnics*, *Excursions* aut simili nomine vocantur. . . . Item de nundinis, vulgo *Fairs*, statuimus . . . ."

side the Church.<sup>23</sup> It charged the Ordinaries to obviate such attendant evils, solicitous that festivities conducted under such untoward circumstances should not receive the stamp of approval in the name of religion.<sup>24</sup> As appears in the text of their enactment, the Fathers of the Third Plenary Council in their Decree n. 290 had expressly in mind<sup>25</sup> this utterance of the previous Council, which in part accounts for the chapter title five, under which Decree n. 290 appears: *Concerning the Prohibited Methods of Collecting Funds for Pious Causes*. The state of things in which their problem lay and the problem itself was, therefore, nothing new to the legislators of the Third Plenary Council; and the objects and precise extent of the respective legislation before them were clearly defined in their minds.

This chapter title five, in fact, appears as among the principal agenda delivered by the Holy See to the Most Reverend Prelates of the United States assembled at Rome in preparation for the Third Plenary Council. Under this title it was proposed to abolish entirely and everywhere amusements,

<sup>23</sup> " . . . praxis pecunias in usus ecclesiasticos iis mediis comparandi, quae peccandi directam praebeant occasionem, scandali publici causae sint haud infrequentes, et nomen Catholicum alienorum ludibriis et opprobriis exponant. Hujusmodi nonnunquam esse videntur eae festivitates, . . . quae vulgo *Pic-Nics, Excursions*, vel simili nomine veniunt."—*Conc. Pl. Balt. II Acta et Decreta*, n. 396.

<sup>24</sup> "Vel enim prohibendum, ut tales festivitates religionis nomine cohonestentur, vel saltem omnino providendum ne, quod cordati jam lugent, peccatorum seminaria fiant." *Ibid.*

<sup>25</sup> As is also evident from the preparatory schema of the Decrees of the Third Pl. Council, n. 312: ". . . omnino cavendum est, ne pecuniam illicitis aut inhonestis modis comparandam ab ipsis aut petamus aut oblatam accipiamus."—*Schema Decretorum Concilii Plenarii Baltimorensis Tertii*, Titulus IX, *De Bonis Ecclesiae Temporalibus*, Caput V. *De Modis Prohibitis Pecunias ad Pias Causas Colligendi*. This schema as well as the texts of the other preliminary acts preparatory to the Third Plenary Council of Baltimore used in the preparation of this article have been generously furnished to the writer by the Reverend Professor Dr. John Tracy Ellis, Professor of American Church History, and by Reverend Dr. Henry J. Browne, Professor of American Church History and Archivist, both of The Catholic University of America.

commonly termed Picnics and fairs, conducted for the purpose of gathering funds for pious uses,<sup>26</sup> because proximate dangers of sin and scandal were discerned in the holding of such gatherings, unless they were closely supervised under the permission and authority of the Bishops, in order to dissipate such dangers<sup>27</sup> and under stated prohibitory stipulations as conditions<sup>28</sup> which were inserted in the final form of Decree no. 290.

From the consideration presented above the following facts are clear. The Third Plenary Council considered the amusements mentioned and those similar in character to be fraught with serious danger to morals and of scandal.<sup>29</sup> In its Decree

<sup>26</sup> *Capita praeceptiva quae Eñi Cardinales S. C. de Propaganda Fide censuerunt a Rñis Archiepiscopis et Episcopis Foederatorum Statuum A.S. Romae congregatis praeparanda esse pro futuro Concilio. VII. De modis prohibitis colligendi pecunias ad pias causas:* "Porro ubique penitus aboleantur conventus oblectationis (vulgo Picnics et fairs) ad corrogandas pecunias in pios usus adhibendas."

<sup>27</sup> *Capita proposita et examinata in collationibus quas coram nonnullis Eñis Cardinalibus Sacrae Congregationis de Propaganda Fide ad praeparandum futurum Concilium plenarium habuerunt Rñi Archiepiscopi et Episcopi foederatorum Statuum Americae Septemtrionalis Romae congregati* (cited hereafter: *Capita proposita et examinata*). *Cap. VII. De Modis Prohibitis Colligendi pecunias ad pias causas*, pp. 7, 8: "Edatur vero decretum, quo dicatur Episcopos non posse conventus illos vel nundinas permittere, nisi moraliter certi sint abesse proxima pericula peccati vel scandali, graviter onerata eorum conscientia." *Relatio Collationum quas Romae coram S. C. de P. F. Praefecto habuerunt Archiepiscopi pluresque Episcopi Statuum Foederatorum Americae. 1883. Caput VII. De Modis Prohibitis colligendi pecunias ob pias causas*, p. 20: "Quoad conventus oblectationis (vulgo *picnics*) Rñus Archiepiscopus Baltimorensis dixit non esse prohibendos, sed moderandos ita, ut pericula peccati et scandali arceantur. . . . Quoad nundinas (vulgo *fairs*) . . . Eñi plura contra istos conventus dixerunt, praesertim quod nullo modo ecclesiasticis convenit promovere festa quibus occasiones peccandi quasi necessario inhaerent, et concluserunt, quod in futuro concilio debeant determinari conditiones sub quibus isti conventus poterunt permitti, ac decretum edi in quo dicatur Episcopos non posse eos permittere nisi moraliter certi sint abesse proxima pericula peccati aut scandali graviter onerata eorundem conscientia."

<sup>28</sup> Cf. *Capita proposita et examinata*, p. 7.

<sup>29</sup> ". . . quoque facilius via ad mala quae timenda sunt et scandala praecludatur, statuimus ut hujusmodi conventus . . ."—*Acta et Decreta Conc. Pl. Balt. III, n. 290.*

n. 290, the Council did not legislate concerning these amusements in general. Rather, in this enactment the Council disallowed to be conducted for the purpose of obtaining funds to pious uses picnics, excursions, fairs, and the like, except under stipulated conditions therein defined and with the permission of the Bishops.<sup>30</sup> For the Council warned that money raised under proximate dangers of sin or scandal were funds obtained by iniquitous means, from which to the ministers of the Church and to the Church no benefit, but rather the wrath and vengeance of God, would accrue.<sup>31</sup> In other words, the mind of the Council was directed to amusements held exclusively for the benefit of pious causes. And it is precisely in this context of language and purpose that the absolute prohibition against dancing occurs. Hence this prohibition must likewise be understood as referable exclusively to dancing employed for the promotion of a pious cause; there is, therefore, no warrant, either in the acts of the Council itself or in the acts preparatory thereto, for extending its prohibition to dancing which has no connection with such purpose. The conclusion must be that the prohibition against dances lies peculiarly and exclusively within the purview and scope of promotion of a pious cause; that it has no relation to the wider circle of mere sociability and recreation conducted in the form of dancing even in exclusively Catholic groups; and that hence also the prohibition is not intended to control the conduct of clergymen in this latter respect.

In the records available to the writer concerning the preparatory conferences held at Rome in the present matter, no express mention is made of dancing either as such or as a prohibitory condition incident to conducting other forms of amusement for pious causes. But at all events, it would be

<sup>30</sup> Cf. Barrett, *A Comparative Study*, p. 200.

<sup>31</sup> "... proxima peccati vel scandali pericula. . . . Animo recolant omnes, cujuscumque gradus aut ordinis sint, Ecclesiae ministri, pecunias iniquis mediis comparatas nullam ipsis aut Ecclesiae utilitatem, sed iram Dei et ultionem potius allaturas."—*Acta et Decreta Conc. Pl. Balt. III*, n. 291.

fairly permissible to assume that in fact dancing did accompany such amusements as those mentioned above. Yet it is not necessary to construe a general conjecture in this respect. In fact, Barrett interprets the prohibition against dances contained in the last sentence of Decree n. 290, as being one of the prohibiting conditions for the holding of such church benefits, inasmuch as it commands priests "to see to it that the abuse of holding entertainments accompanied by dancing for the purpose of promoting good works" be stamped out.<sup>32</sup>

Barrett is correct. Indeed, the mind of the Third Plenary Council is reflected in this Decree itself to be that dances shall form no part of any entertainment conducted for a pious cause, whether it be a banquet or a picnic. That dances were in vogue at these entertainments generally is brought into evidence in the Report of the acts of the Metropolitan Committee of the Province of Milwaukee. To this Committee had been especially assigned for discussion by the Metropolitan and his Suffragans the preparatory chapter, "Concerning the Prohibited Methods of Collecting Funds for Pious causes," of the Third Plenary Council,<sup>33</sup> one of the principal subjects, it will be recalled, proposed by the Holy See. The Report of this as well as of other Metropolitan Committees on other chapters preparatory to the Council were printed and distributed. The Metropolitan Committee of Milwaukee convened, discussed in detail the above mentioned particular topic assigned to it, and made its observations.<sup>34</sup> It defined

<sup>32</sup> *A Comparative Study*, p. 201.

<sup>33</sup> *Relationes Eorum Quae Disceptata Fuerunt ab Illm̃is ac Revm̃is Metropolitanis cum Suis Suffraganeis in Suis singulis Provinciis Super Schema Futuri Concilii Praesertim Vero Super Capita Cuique Commissa*. Baltimore: Iussu Illm̃i ac Revm̃i Archiepiscopi Impressa et Distributa. 1884. *Relatio Provinciae Milwauchiensis Super Plurima Schematis Capita, Praesertim Vero Super Caput VII. De Modis Prohibitis Colligendi pecunias ad pias causas*, p. 17 (cited hereafter: *Relationes*).

<sup>34</sup> "Convenerunt huius Provinciae Episcopi ad vota et consilia conferenda de Schemate materialium in Tertio Concilio Plenario Baltimorensi tractandarum inprimis vero de septimo eiusdem Schematis capitulo quod inscribitur:

by name the forms of amusements, picnics, fairs, etc., conducted for pious purposes,<sup>35</sup> thus indicating precisely the subject matter of the discussions, and decided that dances must strictly be forbidden in these amusements,<sup>36</sup> recalling the language of the Pastoral Letter of the Second Plenary Council.<sup>37</sup> That the forms of amusement mentioned in the Milwaukee Committee were understood as confined to such gatherings held for the benefit of a pious cause is clear from the chapter title of the Committee's Report. This observation of the Milwaukee Committee seems to be the first documented statement in the preparatory acts in which dancing was considered in relation to affairs held for a pious purpose.

The Pastoral Letter of the Second Plenary Council had undertaken " . . . to warn our people against those amusements which may easily become to them an occasion of sin, and especially against those fashionable dances, which, as at present carried on, are revolting to every feeling of delicacy and propriety, and are fraught with the greatest danger to morals. We would also warn them most solemnly against the great abuses which have sprung up in the matter of Fairs, Excursions, and Picnics, in which, as too often conducted, the name of Charity is made to cover up a multitude of sins."<sup>38</sup> The "fashionable dances" in the Letter of the Council seemed certainly to include the so-called "Round Dances,"<sup>39</sup> which,

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'De modis prohibitis colligendi pecunias ad pias causas.' Rdmī Patres, singula capitis puncta discutientes, sequentes observationes faciendas esse statuerunt." *Op. cit.*, p. 17.

<sup>35</sup> "Voce, 'Conventus oblectationum,' intelligendum esse 'Picnics and Excursions;' voce, 'Nundinae,' autem, 'Fairs or Bazaars.'"—*Op. cit.*, p. 17.

<sup>36</sup> "4° Item strictissime et iterum prohibendas esse choreas et saltationes in illis Conventibus et Nundinis."—*Op. cit.*, p. 18.

<sup>37</sup> "Quoad Conventus oblectationum et Nundinas; Patres etiam reiteraverunt verba Conc. Plen. Balt. II, Pastoral Letter, p. CXXI, et statuerunt: . . . 4° (then follows the text quoted immediately above)."—*Op. cit.*, p. 18.

<sup>38</sup> *Conc. Pl. Balt. II, Acta et Decreta*, Pastoral Letter, p. xlvī. Cf. also *Op. cit.*, n. 396.

<sup>39</sup> Thus Sabetti, *Compendium Theologiae Moralis*, 8. ed. (Neo Eboraci, 1892), n. 191, 3°; and Konings, *Theologia Moralis* (Bostoniae, 1876), n. 295, 8°, and n. 1441.

described in condemnatory language by a Statute (1887) of the Diocese of Brooklyn,<sup>40</sup> are identifiable as represented in the manner of dancing, commonly in vogue today, performed by the participants who, in separate and independent couples of man and woman each, holding hands or in a manner of embrace, execute by means of certain steps a general circular movement, as distinguished from some form of group dancing, such as the square dance. According to Souvay, the round dances were “. . . regarded by moralists as fraught, by their very nature, with the greatest danger to morals. To them perhaps, but unquestionably still more obviously to masked balls, should be applied the warning of the Second Council of Baltimore against ‘those fashionable dances, which, as at present carried on, are revolting to every feeling of delicacy and propriety.’ ”<sup>41</sup> In fact, this Council in a decree gave further utterance against immodest dances, which were daily coming into use more and more, ordering them to be condemned.<sup>42</sup> It seems that Round Dancing was understood by some at the Third Plenary Council as included in this enactment of the previous Council,<sup>43</sup> as will appear more clearly

<sup>40</sup> “Choreis quae passim hodie Germanicae dicuntur, et quae a binis, viro scilicet et muliere, manibus vel corporibus mutuo apprehensis orbiculatim duci solent, et vulgo *Round Dances* nominantur condemnationis notam mordicus hucusque inussimus. . . . sacerdotes sciant in posterum huiusmodi choreas nullo pacto permitti licere.”—Quoted in an article, Anon., “Round Dances,” *The Pastor*, VI (1887-8), 335. In the context this statute forbids these dances in festivities held by church gatherings.

<sup>41</sup> *The Catholic Encyclopedia*, IV (1908), s.v. *Dancing*, citing the *Acta et Decreta* of the Second Plenary Council of Baltimore, Pastoral Letter and Decree, n. 472.

<sup>42</sup> “Choreas immodestas, quae quotidie magis magisque frequentantur insectentur ac prorsus damnent.”—n. 472.

<sup>43</sup> As appears from the minutes of the 25th Private Assembly of the Fathers of the Third Plenary Council, Wednesday, December 3, 1884: “Richmondensis dixit scandalum esse fidelibus, quod multi sacerdotes dicant obsoletam esse legem Concilii superioris, ideoque passim absolvant eos qui huiusmodi choreis (*Round dances*) indulgent.”—*Acta et Decreta Concilii Plenarii Baltimorensis Tertii* (Baltimore, 1884), *Sessiones et Congregationes, Congregatio Vigesima Quinta Privata*, p. LXXXVI-LXXXVII.

in the following considerations. This digression from the Report of the Metropolitan Committee of Milwaukee into the acts of the Second Plenary Council serves to introduce the fact, and tends clearly to show, that the matter of dancing held in connection with the promotion of a pious cause posed a serious problem at the Third Plenary Council. But the more important point for this entire discussion is, as will appear from the deliberations at this Council, that this subject matter remained confined in the process of enacting Decree n. 290 to the furtherance of pious purposes.

At all events, dancing, known as *Round Dancing*, presented during the last quarter of the nineteenth century a serious problem to those in care of souls.<sup>44</sup> On the other hand, it was maintained at that time that, "Round dances are not, *per se*, forbidden by the natural law, they are not forbidden to Catholics by any positive law of the church."<sup>45</sup> One must conclude that there was at that time ample reason for the Fathers of the Third Plenary Council to eliminate by positive law the dance from forms of entertainment conducted for pious purposes. For from all the sources and other literature presented in this article, the writer is given the impression that the dance, especially the Round Dance, was at that time considered, more in some quarters, perhaps overzealously, less in others,<sup>46</sup> as enveloped in an aura of serious moral danger,

<sup>44</sup> "Round Dances,"—*The Pastor*, VI (1887-8), 333, where also it is stated that from one quarter there issued the intimation that Round Dancing is against natural law. Cf., also, Anon., "The Prohibition of Round Dancing,"—*American Ecclesiastical Review*, XVII (1897), 540-544, *passim* (cited hereafter: *AER*); C.P.B., "Catholic Dances," *The Ecclesiastical Review*, XXVII (1902), 195-197 (cited hereafter: *ER*).

<sup>45</sup> *The Pastor*, *loc. cit.*, p. 341.

<sup>46</sup> As would appear from a Statute (1887) of the Diocese of Brooklyn: "Choreis quae . . . vulgo *Round Dances* nominantur . . . sacerdotes sciant in posterum huiusmodi choreas nullo pacto permitti licere. . . . Et sciant confessarii se suo muneri non satisfacere si ullo modo, aut sub ullo praetextu, eas permittant aut excusent."—Quoted in *The Pastor*, VI (1887-8), 335. Likewise, from the minutes of the 25th Private Assembly of the Fathers of the Third Plenary Council of Baltimore, Wednesday, December 3, 1884: "Censuerunt Peoriensis, Vincennopol. et Buffalensis, ut omnes cuiusvis generis choreae pro-

so that at about that time it was stated that “. . . it may be safely asserted that with us in the United States the practice of dancing is full of danger.”<sup>47</sup> This consideration would explain the exclusion by the Third Plenary Council of the dance from use in promoting pious causes. For it is apparent from the minutes of the respective Private Assembly of the Fathers of the Third Plenary Council, that the matter of dances was of great concern to them. Likewise, that there was no unanimity among them as individuals as to the extent to which dances should be prohibited by law; that as a body they rejected a wholesale legislative prohibition against dancing; and that they all finally agreed upon the elimination of the dance as a means of promoting pious causes in the terms essentially as they appear in the Decree n. 290.<sup>48</sup> In fact, on the day

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hibeantur. . . Roffensis existimavit periculum latere in legibus, numero et rigore nimis, ferendis; choreis ruri tuto indulgere posse cum cautela debita; secus juvenes ad acatholicorum choreas abituros. Huic consensit Dibonensis. Censuit choreas ruri permittendas, sed in urbibus prohibendas. Lex Concilii Plenarii superioris malum non sanavit, sed nimio rigore aggravavit. Huic consensit Cincinnatensis. Eriensis censuit rem Synodis relinquendam. Propositio Peoriensis rejecta fuit, viginti et uno tantum agentibus. . . Richmondensis dixit scandalum esse fidelibus, quod multi sacerdotes dicant obsoletam esse legem Concilii superioris, ideoque passim absolvant eos, qui hujusmodi choreis (*Round dances*) indulgent. Vult ergo ut dicatur ‘prohiberi semper et pro semper.’ Monuit Delegatus, quod exemplis quoque probavit, Romae de hisce choreis non ita severe judicari. Milwauchiensis notavit has tantum choreas Bohemis, Polonis et Germanis notas esse, neque apud eos peccati esse causam. Igitur non sunt omnino et ubique damnandae. . . Dibonensis, qui adjecit in sua dioecesi et (teste Rdmo Baltes) in Altonensi choreas nocturnas ad morum bonorum fideique ipsius ruinam ducere.”—*Acta et Decreta Conc. Pl. Balt. III, Sessiones et Congregationes, Congregatio Vigesima Quinta Privata*, p. LXXXVI-LXXXVII.

<sup>47</sup> Arminio, “The Morality of Round Dances,”—*AER*, VIII (1893), p. 48.

<sup>48</sup> For the sake of clarity, since the minutes of this Private Assembly are quoted partially in other places herein, the reader may not take amiss the quotation here of the complete minutes, recorded on the present question, of the 25th Private Assembly, Wednesday, December 3, 1884: “Velingensis voluit ut choreae quas *Round Dances* appellant, hac lege [n. 315 in earlier Schema of Decrees, which is n. 294 in a later Schema and n. 290 in the Authentic Decrees] includantur. Censuerunt Peoriensis, Vincennopol. et Buffalensis, ut omnes cuiusvis generis choreae prohibeantur. Rdmo S. Pauli non arrisit proposita a Velingensi prohibitio. Si unum quoddam chorearum genus

previous to this final decision, it is recorded that in their assembly some of the Fathers of the Third Plenary Council had directed their observations against dances held to obtain funds for any pious cause.<sup>49</sup>

In other words, from their deliberations it is evident that the question of the absolute and total exclusion of dances by law was squarely before the Fathers of the Third Plenary Council, and that they elected not to enact a law in such terms. Rather, without actually condemning any dance as such and apart, they intended and did by law reject as an

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prohibeatur, inde concludent Catholici cetera licere. Prohibendae sunt choreae omnes in festis istis conventibus. Hinc enim acatholici nos irridere et contemptui habere didicerunt. Roffensis existimavit periculum latere in legibus, numero et rigore nimis, ferendis; choreis ruri tuto indulgere posse cum cautela debita; secus juvenes ad acatholicorum choreas abituros. Huic consensit Dibonensis. Censuit choreas ruri permittendas; sed in urbibus prohibendas. Lex Concilii Plenarii superioris malum non sanavit, sed nimio rigore aggravavit. Huic consensit Cincinnatensis. Eriensis censuit rem Synodis relinquendam. Propositio Peoriensis rejecta fuit, viginti et uno tantum agentibus. Altera Velingensis probata fuit, agentibus quadraginta. Richmondensis dixit scandalum esse fidelibus, quod multi sacerdotes dicant obsoletam esse legem Concilii superioris, ideoque passim absolvant eos qui hujusmodi choreis (*Round dances*) indulgent. Vult ergo ut dicatur 'prohiberi semper et pro semper.' Monuit Delegatus, quod exemplis quoque probavit, Romae de hisce choreis non ita severe judicari. Milwauchiensis notavit has tantum choreas Bohemis, Polonis et Germanis notas esse, neque apud eos peccati esse causam. Igitur non sunt omnino et ubique damnandae. Crossensis postulavit ut choreae nocturnae ad pia opera promovenda prohibeantur. Consensit Dibonensis, qui adject in sua dioecesi et (teste Rdmo Baltes) in Altonensi choreas nocturnae ad morum bonorum fideique ipsius ruinam ducere. Probarunt omnes hujusmodi additamentum. (Quod videre est ad calcem num. 294 Novi Schem.) [Scil., n. 294: . . . Reprobamus quoque illum abusum, quo convivia nocturna [sic] parantur cum choreis ad opera pia promovenda.]"—*Acta et Decreta Conc. Pl. Balt. III, Sessiones et Congregationes, Congregatio Vigesima Quinta Privata*, p. LXXXVI-LXXXVII.—N.B. In the text which is before the writer the "*Reprobamus*" clause is deleted, and there is entered on the margin, written in longhand with ink, the "*Mandamus*" clause which is now the last sentence of Decree n. 290 of the authentic decrees of the Third Plenary Council.

<sup>49</sup> "Agitur de Titulo IX. C.V. *De Modis prohibitis pecunias ad causas pias colligendi*. . . Plures deinde synodales loquuntur contra choreas et convivia habenda ad pecuniam pro quacumque causa pia obtinendam."—*Op. cit.*, p. LXXXII-LXXXIII.—*Congregatio Publica Septima. FERIA III, Die Secunda Decembris*.

abuse the holding of dances, by whomsoever employed,—the terms of the law make no distinction—as a means of promoting pious works. The Council did not attempt, at least directly, to probe the extent of the danger. It seems, perhaps, that it accepted the serious danger to morals resulting from such dances as a present fact. The gist of the law is precautionary. This effect of its enactment was precisely so understood.<sup>50</sup> The dance was a prominent feature of the ball,<sup>51</sup> particularly of the masked ball, which latter was considered especially dangerous to good morals.<sup>52</sup> Moreover, it was *dancing* which engrossed the attention of the Council, which was reflected in this particular law seeking to abolish balls; certainly not the dining as such at a banquet or dinner, except, of course, that these should involve other objectionable features contrary to the spirit of the present Decree.

Accordingly, there was in this particular legislation no direct question whatever of priests attending dances conducted for the promotion of pious causes. Clearly, this law has no direct reference to the conduct of clergymen in regard to their special rank and state of life. Priests are explicitly commanded to abolish such dances as an abuse; *a fortiori* they can not attend them. The law is absolute in its terms, inasmuch as it forbids such dances to be conducted even by the laity. Hence Barrett<sup>53</sup> correctly and aptly sets this law in parallel with canon 1499,<sup>54</sup> which declares that the Church

<sup>50</sup> "Neque Patres *Con. Plen. Balt. III* choreas quascumque aut etiam *choreas praedictas* [scil., *round dances*] proprie damnarunt cum n. 290 sequens praeceptum imposuerunt: 'Mandamus quoque ut sacerdotes illum abusum, quo convivia parantur cum choreis (*balls*) ad opera pia promovenda omnino tollendum curent.'"—Sabetti, *Compend. Theol. Moral.*, n. 191, 4°; Anon., "The Prohibition of Round Dancing,"—*AER*, XVII (1897), 542, 544. Cf. also Arminio, "The Morality of Round Dances,"—*AER*, VIII (1893), p. 47.

<sup>51</sup> Arminio, *loc. cit.*

<sup>52</sup> Konings, *Theol. Moral.*, n. 295, 8°; Sabetti, *Compend. Theol. Moral.*, n. 191, 6°.

<sup>53</sup> *A Comparative Study*, p. 201.

<sup>54</sup> "§ 1. Ecclesia acquirere bona temporalia potest omnibus iustis modis iuris sive naturalis sive positivi, quibus id aliis licet."

may acquire temporal goods by all just means permitted to others. The Baltimore law is *ex professo* speaking of such means which at that time were considered not just because infected with serious danger to good morals;<sup>55</sup> and the law was so understood, namely, as obviating "... a dangerous diversion which the Church does not wish to have employed as a means of procuring funds for the maintenance of her pious work."<sup>56</sup>

In concluding here the direct consideration of the Baltimore law, it is important to note, on the basis of the foregoing discussion, that this law extended its prohibition of the dance only in so far as the dance is an implement employed to foster pious causes. In this restricted sense the prohibition is absolute. Likewise, that this law, thus considered, can not properly and directly be used as the basis upon which to determine the issue concerning the permissibility of attendance of clergymen at dances generally. For even the undertaking by laymen of such dances is considered by ecclesiastical law as an abuse.<sup>57</sup> It is considered generally that this Decree in its terms is still in force, inasmuch as it is not contrary to the Code.<sup>58</sup> Finally, if the mind of the Council, as established in its Decree, is viewed from the vantage point outlined in the foregoing, the intendment of the pronouncements of the Holy See in respect to this Decree of the Council is more clearly and precisely understood; and these pronouncements themselves seem reciprocally to clarify the enactment of the Council in regard to the present subject. Two such pronounce-

<sup>55</sup> Cf. *Acta et Decreta Conc. Pl. Balt. III*, nn. 290-291, where such danger is clearly apprehended as serious.

<sup>56</sup> Arminio, "The Morality of Round Dances,"—*AER*, VIII (1893), 47; Cf., also, Graham, "Some Questionable Methods of Raising Church Funds,"—*ER*, XL (1909), 622-623; Barrett, *A Comparative Study*, pp. 200-201.

<sup>57</sup> Cf. Arminio, *loc. cit.*

<sup>58</sup> Can. 6; cf. Barrett, *A Comparative Study*, p. 201; Woywod, "Dances for Benefit of a Parish,"—*HPR*, XXXII (1932), 1079.

ments are cited generally; there may have been others, issued privately to Ordinaries in the United States.<sup>59</sup>

### III. THE PRONOUNCEMENTS OF THE HOLY SEE

The first of these pronouncements was issued in 1916 by the S. Consistorial Congregation in the form of a Decree concerning *certain*, it must be noted, dances (*Circa quasdam choreas*). For the reader's convenience this document is here reproduced in full:

#### SACRA CONGREGATIO CONSISTORIALIS

##### I

##### DECRETUM

*Circa quasdam choreas in statibus foederatis Americae septentrionalis et in regione Canadensi.*

Elapso saeculo, in foederatis Americae septentrionalis Statibus usus incoeperat catholicas familias convocandi ad choreas quae per multas noctis horas cum conviviis aliisque solatiis protrahi consueverant. Cuius rei ea dabatur ratio et causa, quo scilicet catholici se mutuo cognoscerent et amoris caritatisque vinculis intimius unirentur, simulque ut subsidia pro hoc illove pio opere necessaria compararentur. Qui autem conventus indicere eisque praesidere solebant, praesides plerumque erant alicuius pii operis, et non raro ipsi ecclesiarum rectores vel parochi.

Verum Ordinarii locorum, quamvis de recto fine eorum qui has choreas promovebant non dubitarent, nihilominus damna et pericula inolitae praxis perspicientes, sui officii esse censuerunt eas proscribere: et ideo in can. 290 plenarii Concilii Baltimorensis haec statuerunt: "Mandamus quoque ut sacerdotes illum abusum, quo convivia parantur cum choreis (*balls*) ad opera pia promovenda omnino tollendum curent."

Ast, ut in humanis saepe accidit, quae iustissime sapienterque ab initio iussa fuerant, paulatim in oblivionem venire coeperunt, et chorearum usus denuo invalescere, imo et in proximam Canadensis domini regionem diffundi.

<sup>59</sup> Thus, a reply to the Ordinary of St. Cloud, cited in Beste, *Introductio in Codicem*, p. 194.

Quae cognoscentes Eñi S. C. Consistorialis Patres, auditis pluribus locorum Ordinariis, et re multo cum studio examini subiecta, censuerunt, standum omnino esse sanctionibus a Concilio Baltimorensi III statutis: et probante SSmo D. N. Benedicto PP. XV, decreverunt, sacerdotes quoslibet sive saeculares sive regulares aliosque clericos prorsus prohiberi, quominus memoratas choreas promoveant et foveant, etiamsi in piorum operum levamen et subsidium, vel ad alium quemlibet pium finem; et insuper clericos omnes vetari, quominus hisce choreis intersint, si forte a laicis viris promoveantur.

Hoc autem decretum publici iuris fieri et ab omnibus religiose servari Summus Pontifex iussit, contrariis quibuslibet minime obstantibus.

Datum Romae, ex aedibus Sacrae Congregationis Consistorialis, die 31 martii 1916.

✠ C. CARD. DE LAI, Ep. Sabinen.

*Secretarius*

L.S.

✠ THOMAS BOGGIANI, Archiep. Eddessen.,

*Adessor.*<sup>60</sup>

The document embodies the following items. It recites the practice, in our country during the century past, of holding dances in conjunction with dinners and other amusements. These gatherings were held for the purpose of mutual acquaintance and of cementing the ties of affection and esteem among Catholics, and at the same time in order to obtain the assistance necessary for some pious work. These gatherings were arranged and directed usually by the leaders of some pious undertaking and frequently by the rectors of churches or pastors. The local Ordinaries, though convinced of the proper purpose intended by these dances, discerned nevertheless harm and danger in the continuance of this practice, and deemed it their duty to forbid them by the enactment of Decree n. 290 of the Third Plenary Council of Baltimore. The text of the document quotes the pertinent *Mandamus* clause of that Council. However, the recital continues, the

<sup>60</sup> AAS, VIII (1916), 147.

use of the dance continued with renewed vigor. Being advised of this, the Cardinals of the S. Consistorial Congregation, after consultation with several local Ordinaries and considerable investigation of the matter, determined that the Decree of the Council of Baltimore must prevail. And, with the approval of the Pope, it was decreed that all priests, secular and religious, and other clergymen are absolutely forbidden to promote and foster the dances mentioned, albeit for the relief and assistance of pious works, or for any other pious purpose; moreover, that all clergymen are forbidden to attend these dances conducted by laymen.

This Decree of 1916 not only enforced the law of Baltimore, but it seems to clarify it in the sense outlined in the foregoing discussion. Among other matters which will be dealt with severally in the following, it may here be noted that this pronouncement of the Holy See explicitly isolates the dance itself, employed as a medium of promoting any pious cause, and that, as so engaged in, and only so, it prohibits its use. Moreover, this prohibition obtains regardless of any attendant circumstances and conditions under which dancing is thus employed. This inclusive feature of the prohibition is implicitly contained in this pronouncement. However, all doubt in respect to this particular question was explicitly terminated by a further Declaration of the Holy See in 1917, which is here also fully set out for the reader's convenience:

#### SACRA CONGREGATIO CONSISTORIALIS

##### DECLARATIO SUPER DECRETO DE CHOREIS

Cuidam Ordinario in Foederatis Americae Statibus roganti "utrum choreae de quibus agit decretum S. Congregationis Consistorialis diei 31 martii 1916 quasque eadem S. Congregatio proscripsit, licitae aliquando sint, seu in reprobatione non comprehendantur, si fiant diurnis horis, aut primis tantum noctis horis, nec nimium protrahantur, vel etiam si fiant sine conviviis aut ea methodo quae vulgo appellari solet *Picnic*": Sacra Congregatio Consistorialis, re considerata, respondendum

censuit: in reprobatione comprehendi; ideoque clericos omnes prohiberi quominus eas, etiam in memoratis adjunctis, promoveant et foveant, et si ab aliis promoveantur, prohiberi quominus ipsi intersint.

Sanctissimus autem Dominus in audientia diei 30 novembris huius anni resolutionem confirmavit, et edi iussit pro norma omnium ad quos spectat.

Datum Romae, ex aedibus Sacrae Congregationis Consistorialis, die 10 decembris 1917.

✠ C. CARD. DE LAI, Ep. Sabinen.,  
*Secretarius*

L.S.

✠ V. SARDI, Archiep. Caesarien.  
*Adessor.*<sup>61</sup>

The gist of this Declaration is that the dances referred to in the above mentioned pronouncement, the Decree of 1916, and therein forbidden, include dances held at any time of day or night, without attendant dinners and at picnics; that all clerics are forbidden to promote and foster them under the said circumstances and to attend them if promoted by others.<sup>62</sup> Briefly, dancing in connection with the promotion of any pious cause is forbidden; priests must abolish such dancing as an abuse; *a fortiori* clerics may not be present at such dancing. This statement comprehends the complete scope of this law of the Third Plenary Council of Baltimore on dancing together with the above pronouncements of the Holy See incident thereto, both as to dancing as such and particularly in regard to the attendance of clergymen at dances.

Yet even after these pronouncements of 1916 and 1917, it has been stated concerning the original Baltimore law, that it is not clear "whether the Council of Baltimore meant to forbid every kind of dance arranged by or for the parish,"<sup>63</sup> and

<sup>61</sup> AAS, X (1918), 17.

<sup>62</sup> Cf. Woywod, "The Church Forbids the Clergy to Promote Dances,"—*HPR*, XXIX (1938), 174; Donovan, "Priests as Dance Super-Bouncers,"—*HPR*, XLV (1945), 930.

<sup>63</sup> Woywod, "Dances for Benefit of a Parish,"—*HPR*, XXXII (1932), 1080; Donovan, (J. T.), *Clerical Obligations*, pp. 165-166.

that this law does not receive uniform interpretation and application.<sup>64</sup> Such statements do, indeed, suppose a rather wide margin of obscurity.

Rather numerous have been the comments made by writers upon the implications of the legal enactments which have thus far been presented to the reader. For the most part, their lack of clarity is a source of no little confusion. It will be the burden of the second part of this article to review the character of the relevant comment, to ascertain the source of its inaccuracies, to derive a clear notion of the precise intent of the law, and even at length to suggest that the law itself has ceased to bind because of the obsolescence of the purpose which prompted the enactments upon which it rested. The presentation of these phases of the subject is reserved to the subsequent issue of *THE JURIST*.

J. SCHMIDT

THE CATHOLIC UNIVERSITY OF AMERICA  
WASHINGTON, D. C.

<sup>64</sup> Cf. Woywod, *loc. cit.*

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#### ANNUAL STATEMENT OF THE HIERARCHY

The annual statement of the Hierarchy of the United States issued on the occasion of their annual meeting in Washington, November 15-17, 1950, was entitled "The Child: Citizen of Two Worlds." It indicted modern society for its failure to educate the child for eternal life, while it exhorted parents to inspire in their children a sense of responsibility to God, an attitude that would result in their dedication of their labors to His service. It pointed to American traditions as recognizing that the child finds the completion of his being only in God. It praised the work of private agencies caring for unfortunate children, defended released-time as a needed minimum of religious instruction, insisted that instruction in regard to sex must be restricted to the home, and urged parents to manifest appropriate gratitude to God when He visited their homes with a religious vocation for their children.

## Cases and Studies

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### LISTING FORBIDDEN BOOK IN BIBLIOGRAPHY

Is there any rule or regulation forbidding the inclusion in a bibliography or a list of suggested readings the *title* of a book banned by the Church, either explicitly on the Index or by general legislation? It is assumed that the bibliography would be for public distribution, and would not indicate that the book was forbidden.

I realize that the Code forbids the communication of a forbidden book to another, but this appears to refer only to the *contents* of the book. I have received one opinion to the effect that inclusion of the title of a forbidden book in a bibliography would not be forbidden, but I have since read in Davis, *Moral and Pastoral Theology* (Vol. II, p. 421), that Catholic booksellers should not list forbidden books in their catalogs. I would like, if possible, to receive an answer to this question. I am particularly anxious for your reply may affect an encyclopedia article I have recently written.

BIVIVUM

It would be relatively simple to answer this question if it were restricted to asking whether there is an explicit prohibition forbidding the inclusion of a prohibited book in a bibliography. The answer would be that there is none.

So direct an answer cannot be given to the question whether there is an implicit prohibition against such an act. This implicit prohibition could derive from the ecclesiastical law or from the natural law. It would be derived from the former if it flowed as a natural corollary from it or if it were necessary to support a positive enactment already made. It does seem that to spread broadcast the knowledge that a forbidden book is available for study in a subject which one offers to the public provides advertising for the book. In this way, it seems to encourage others to read it. On the other hand, it is an axiom that the purpose of the law is not in itself the subject matter of the law. One does not need, therefore, to feel himself obliged, by reason of the precept, to aim at the realization of the law's objective by all means in his power. It suffices that he use the means described in the text of the law, i.e., it suffices that he obey the precept. Thus the purpose of the law is not, as such, implicitly the subject matter of the precept itself. It is not a corol-

lary of the law. On the other hand, the publishing of the title of the forbidden book does not prevent the fulfillment of the law by those who see the title thus published. They may even read the book if they have the requisite permission.

As to the natural law, there is derived an obligation to avoid cooperation in the sin of others, i.e., to avoid present participation in their sin and to avoid provoking them to or leading them into sin. From the point of view of cooperation, the publishing of the title of the book in a bibliography seems a remote cooperation in the sin of one who reads it without permission. There is no factor in the act of listing of the book that enters immediately into the decision of the reader to read the book without permission. Now if one were required to prevent such a remote influence from operating, it would never be allowed in any work to mention the name of the book, even in works of theology. It may be said that in such works, it is apparent that the book is forbidden. But in spite of that, a person who otherwise would not have known of the book can, after he learns of it in this fashion, decide to read it without permission. In this case, the sin would be a formal one. In the case in which the title is published without reference to the fact that the book is forbidden, the sin of the reader who read in ignorance of the fact of the prohibition would be only a material sin.

But some who thus read the book may be led into formal sin by what they read in the book. This consequence would, in some respects, point to the bibliography as the cause of the sin. It should rather be described as the occasion because of the free intervening choice of the person who read the book. The natural law does not permit that occasion for sin be wantonly placed in the way of others. But where the very fact that the occasion becomes such is owing to the peculiar qualities or defects of the person who seizes it or is seized by it with a resulting sin, the act in itself is not the occasion of the sin; rather it is the act performed in the environment of a person prone to sin because of its performance. The publishing of the title of the forbidden book in a bibliography seems not in itself an occasion of sin, even when there is no indication that the book is a forbidden book. If it is read without permission by one who knows it is a forbidden book, the naming of the book in the bibliography is a fact that he seizes to his own detriment and on his own responsibility. If it is read without permission by one

who did not know it was forbidden and who sins because of some evil references in the book, then this person is seized by the naming of the book in the bibliography but only because of the specific defects of the person involved: among these are the lack of familiarity with the nature of the book, ignorance of the fact that it is forbidden by ecclesiastical law, a gullibility that accepts without investigation the value of what is seen in print, a lack of prayerfulness against temptation, and an obtuseness that fails to recognize the oncoming of temptation in its earliest stage. In spite of the fact that the occasion, in this case, is manufactured almost entirely by the sinner himself, the natural law requires that one shall not provide any of the cloth unless there is a proportionate reason justifying the action.

It seems that one has a sufficient and proportionate reason to list a forbidden book in his bibliography. One's reputation as a scholar or at least the authoritativeness of one's article rests upon evidence that one has not ignorantly proceeded without a knowledge of the works available in the respective field. One may drive an automobile at a great rate of speed in an emergency even though some thoughtless youth may justify that same rate of speed in his own case on the example given by one compelled thus to act by the emergency. The emergency justified the speed in spite of the fact that a careless youth might find in it an excuse for his habitual disregard of the rules of safe driving. So in this case, the publishing of the title of the forbidden book in a bibliography is based on a sound reason. That specially prone individuals may use the act as an occasion of sin does not forbid it.

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### COOPERATION IN FORBIDDEN MERCHANDISING

The recent decree of the Holy See promulgating a specially reserved excommunication *latae sententiae* against clerics and religious, brings to the fore once more the interpretation of Canon 142. I am taking the liberty of sending you a few questions, the answers to which I hope you will help me find.

Bouscaren-Ellis (*Canon Law*, p. 119) say: "To sell . . . pious articles to pilgrims in connection with a shrine, is not profit-seeking business, provided it is reasonably conducted and is really not for profit but for the convenience of the buyers". Vermeersch-Creusen (*Epitome*, vol. I, on Canon 142) permit the taking of a moderate profit from the sale of religious articles by clerics; "*vitetur tamen omnis species turpis lucri*".

1) Does the correct intention in this matter constitute an essential condition for its licitness? Perhaps it is a rash judgment, but it seems to me that not many, if any, parishes or shrines would carry religious articles unless there was a profit. In fact the profit is looked forward to and counted upon as a means of support. Would this render the practice a violation of Canon 142 and the violators subject to the censure recently promulgated?

2) What is a moderate profit? The retail price of religious articles is in many cases often 100% or even much more over the wholesale price. Are those clerics or religious, who conduct shrines or sell such articles in their parishes or schools or houses to visitors, justified in charging the same retail prices as do secular religious article stores, or even to charge more, upon the plea that the buyers are willing to pay more since the profit goes for a good cause? Would the taking of such profits be considered immoderate and constitute a violation of Canon 142 and subject to the censure against trading by clerics and religious?

3) If the above (1 and 2) constitute violations of Canon 142, would clerics and religious who have been assigned to sell religious articles, but who have nothing to do with the buying or fixing of the prices, be able, with easy conscience, to fulfill their assignment or must they protest and refuse to do so, under penalty of violating Canon 142 and incurring the censure? The same question might apply also to lay persons, from the angle of cooperation, who might be asked to work at religious article stands or help sell them in parishes, etc.

4) If the above (1 and 2) constitute violations of Canon 142, could a cleric or religious not specifically assigned to sell such articles, but who, in the absence of one so assigned, is asked to serve a buyer or even offers to serve one without being asked, wait on the buyer, indicate and accept the prices fixed for the articles or would he be acting wrongly and subject to the censure?

5) The same question could be asked with regard to the sale of books in schools, and catechisms, etc., in parishes, as well as refreshments, greeting cards, etc., on the part of religious organizations.

#### VENDAX

The profit which Vermeersch is said to allow in so-called "political" merchandising is really not profit since it seems that he is speaking only of gross profit and not net profit. Obviously the overhead is not profit. To mark up goods sold for the convenience of pupils only to the extent of the overhead is not to profit from the venture. In conducting such an enterprise, it is not always possible to avoid making even a net profit on a given article or on a given day. That result is incidental. It is the average that determines the character of the business, whether it is profit or non-profit. Moreover, from the viewpoint of secular jurisprudence, a corpora-

tion is non-profit as long as its temporary net profits are periodically turned back into its activity. In the case of a college this would mean that the temporary profits would be turned back into the college for the benefit of the students. If they were turned over to the faculty or to the religious institute conducting the college, they would retain their character as profits and the enterprise would cease to be non-profit. Thus it is clear that if one makes a profit, even though it is incidental, and if one turns it over to the person conducting the enterprise rather than to the service of those who paid the price resulting in a profit, one is a merchandiser as forbidden by the law, no matter what one's intention might have been in the beginning.

Since the making of a temporary or an incidental profit does not constitute a violation of the ecclesiastical law, even when otherwise the venture shares the nature of a shop, subordinate persons should not accuse their superiors of such a violation unless they have proof of it. In the absence of such proof, they can with a safe conscience assist in the sale of the respective commodities, even to the extent of devoting regular periods of time to it. It is only when they have moral certainty that they are cooperating in a violation of the law that they need feel troubled in conscience. Even then their cooperation would frequently be remote, since it is the pocketing of the profits by their superiors that constitutes the actual violation of the law, not the sale of the commodities which may result in a temporary or an incidental profit. If it is remote cooperation, there is usually sufficient ground derived from the obligation of preserving charity to allow the subordinate to cooperate.

From these observations it is readily apparent that it is usually the bursar or the procurator whose conscience will be burdened with the moral problems arising from the sale of commodities. No matter what the superior demanded, it seems that the bursar is in a position to be fully aware of whether profits are being made and of what is being done with them. Moreover, it can scarcely be said that his cooperation is remote, since he is precisely the agent through whom the violation takes place, if it occurs at all. Of course, local superiors must exercise supervision over their bursars. If through negligence on the part of the superior, or through the latter's ignorance, the bursar violates the law against profit-making, the superior is also guilty of the violation.

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## LOSS OF INDULGENCE OF THE WAY OF THE CROSS

Wuest-Mullaney in *Matters Liturgical* (paragraph 844) referring to the erection of the Way of the Cross, state: "In case new Stations are to be substituted for those which were properly erected . . . Blessing of the new Crosses by a Priest designated for the purpose is sufficient." Does that mean that in this case of substitution there is no need for re-erecting and therefore no need for faculties, the blessing alone of the new crosses sufficing?

RENOVANS

The statement regarding the sufficiency of the blessing of the crosses when new ones are to take the place of those used in the original erection of the Way of the Cross means that a new document is not required attesting the erection of the Way of the Cross.<sup>1</sup> It is only when less than half the crosses are new that a new erecting of the Way of the Cross is unnecessary. In that case, the few crosses need not even be blessed.<sup>2</sup>

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## LOCAL ORDINARY'S CONTROL OVER INSTITUTE OF DIOCESAN APPROVAL

A superior of a diocesan congregation of Sisters discovered recently that, in order to establish a new house in another diocese, it is necessary to have the authorization of both the Ordinary of the diocese in which the mother house is located and the Ordinary of the place where they intend to establish the new house, as well as authorization from both Ordinaries if they wish to amend their rules. In this instance a new house was opened in another diocese for Sisters attending a college and since then the rules have been altered, with only the authorization of the Ordinary of the diocese in which the mother house is located. The Superior wishes to know whether she should do anything at this late date to rectify this oversight.

VACUEFACTUM

As to the house of the religious institute of diocesan approval, it can be argued that the foundation was invalid. It seems desirable to obtain the consent of the local Ordinary of the diocese in which the college is located in order to validate the existence of the

<sup>1</sup> Cf. S.C. Indulg., decr. 11 ian. 1896 *apud* Aertnys-Damen, *Theologia Moralis* (14. ed., 2 vols., Taurini: Marietti, 1944), II, n. 1143.

<sup>2</sup> S.C. Indulg., decr. 13 nov. 1837 (*Fontes*, n. 5006) and decr. 20 aug. 1844 (*Fontes*, n. 5034).

religious house.<sup>1</sup> If the house does not have its own superior, it is not a religious house in its own right, and the permission would not be needed. However, it seems to have been established as an independent house. In the case of an independent house, the consent of the local Ordinary of the diocese in which the college is located was needed for the modification of the constitutions. Consequently, the changes are devoid of effect, and the constitutions remain as they were before the changes were attempted. Any acts performed in reliance on the invalid changes would be lacking in effect.

If it were certain that the establishment of the house was invalid, the changes in the constitutions would stand, since it is the existence of the validly established house in his diocese that gives the local Ordinary of the diocese in which the college is located the right to pass on those changes. One is thus confronted with an "either-or" situation. The local Ordinary's intervention was needed either for the establishment of the house or, if that was valid without his intervention, for the changes in the constitutions. Thus ratification is needed; and since the local Ordinary must be approached, it seems wise that he should be asked to ratify both the establishment of the house and the changes in the constitutions. This ratification becomes effective only on the date when issued. If a sanation is desired, the Holy See is the only competent authority to grant it.

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### MAJORITY REQUIRED WHEN ALL CANDIDATES ARE INELIGIBLE

In the forthcoming election for a superior of this institute of diocesan approval, it will be impossible to elect a superior possessing all the qualifications required by the Code. This is owing to the fact that no one of the professed has been a member of the institute for the required ten years. If only a relative majority is obtained by one of the professed on the third ballot, can his name be sent to the Sacred Congregation with a request for the admission of the postulation?

NOVELLUS

<sup>1</sup> Cf. Flanagan, *The Canonical Erection of Religious Houses*, The Catholic University of America Canon Law Studies, n. 179 (Washington, D. C.: The Catholic University of America Press, 1943), pp. 49-53; Coronata, *Institutiones Iuris Canonici*, I (2. ed., Taurini-Romae: Marietti, 1939), n. 523, footnote 8.

The question here proposed seems to be treated only by Maroto in his annotations in the *Commentarium pro Religiosis*.<sup>1</sup> It is from this source that Schäfer borrows his statement.<sup>2</sup> Both admit that a relative majority suffices for postulation on the third ballot, provided, of course, that no eligible candidate receives votes on that ballot. Intrinsically the position seems justified at least by analogy, since canon 180, § 1,<sup>3</sup> does not specify whether the majority required for postulation is an absolute or a relative majority.

### COOPERATION IN NON-CATHOLIC TRAINING OF FOUNDLINGS

A Catholic social worker employed by a secular agency has had great influence with non-Catholic unwed mothers in persuading them to go to foundling hospitals for the birth of their children. If possible, she persuades them to go to the Catholic foundling asylum, but when they refuse to do this, she makes arrangements for them in the non-sectarian hospital. The children are, as a consequence, placed with non-Catholic families when the mothers relinquish their right to them, whereas they would be placed with a Catholic family, it is presumed, if the mother had agreed to go to the Catholic foundling hospital. She wonders if she may lawfully continue to cooperate with the arrangements placing these women in the non-Catholic foundling hospital.

#### EMENDATRIX

A very grave justifying reason deriving from the unfavorable reaction to be expected on the part of unwed Protestant mothers, if the social worker should stubbornly favor the Catholic foundling asylum, seems sufficient to permit the material cooperation of a Catholic in the wishes of the mother. The placement in a non-Catholic home is, moreover, the less of two evils, if one looks at the

<sup>1</sup> Cf. *Commentarium pro Religiosis*, III (1922), 129-132.

<sup>2</sup> Schäfer, *De Religiosis* (4. ed., Romae: Typis Polyglottis Vaticanis, 1947), n. 524.

<sup>3</sup> Can. 180, § 1. Ut postulatio vim habeat, pro ea stet oportet maior suffragiorum pars, imo, si cum electione concurrat, saltem duae tertiae partes requiruntur.

Can. 174. Is electus habeatur et a collegii praeside proclametur, qui requisitum suffragiorum numerum retulerit, ad normam can. 101, § 1, n. 1.

Can. 101, § 1, 1°. Nisi aliud expresse iure communi aut particulari statutum fuerit, id vim iuris habet, quod, demptis suffragiis nullis, placuerit parti absolute maiori eorum qui suffragium ferunt, aut, post duo inefficacia scrutinia, parti relative maiori in tertio scrutinio; . . .

probability of the violation of the natural law through abortion that might seem the easier solution of the unwed mother's plight.

So long as a parent has control over her child, one's attitude to that child's religious situation is analogous to one's attitude to the parent herself. Now, if the parent were in danger of death, a Catholic, for sufficient reasons, could invite a non-Catholic minister to see the patient, not to minister to the latter, of course.<sup>1</sup> This is positive, though remote and material cooperation. In regard to children, negative cooperation in their Protestant rearing is apparent as often as those who have even temporary care of them make no effort at proselytism. Such cooperation is frequent enough and causes no wonderment. It is when this cooperation takes on a positive aspect that one stops and finds it difficult to justify the action. In the case at hand, this hesitance can be met by a realization that the decision is the mother's and that, in making it, she is in no different position from that of a mother who would take the child home with her. A Catholic cooperating with the mother in accord with the latter's decision is in an analogous position with a Catholic who has charge of a non-Catholic child. Of course, in danger of death, a Catholic would baptize an infant even against its mother's wishes.<sup>2</sup> But outside the danger of death the infant must be regarded as a non-Catholic child. Viewed in this light, with due attention given the cases of negative cooperation frequently exercised by guardians and supervisors of non-Catholic children, it is somewhat less difficult to accept the justification of the positive cooperation that entrusts a non-Catholic child to non-Catholic persons. Since it is the non-Catholic mother who has made the decision, the Catholic cooperation seems hardly to differ from the

<sup>1</sup> Cf. Noldin-Schmitt, *Summa Theologiae Moralís*, II (28. ed., Munich-Heidelberg, 1944), n. 122, e; Davis, *Moral and Pastoral Theology* (New York: Sheed & Ward, 1945), I, 284; cf. S.C.S. Off. decr. 4 mart. 1848 and 5 febr. 1872—*apud* Davis, *loc. cit.*

<sup>2</sup> Can. 750, § 1. Infans infidelium, etiam invitís parentibus, licite baptizatur, cum in eo versatur vitae discrimine, ut prudenter praevideatur moriturus, antequam usum rationis attingat.

§ 2. Extra mortis periculum, dummodo catholicae eius educationi cautum sit, licite baptizatur:

2°. Si parentes, idest pater, mater, avus, avia, vel tutores desint, aut ius in eum amiserint, vel illud exercere nullo pacto queant.

Can. 751. Circa baptismum infantium duorum hareticorum . . . generatim servantur normae in superiore canone constitutae.

act of taking the baby to its non-Catholic grandmother, should the mother die in childbirth.

### COMMON ERROR REGARDING RESERVED SINS

If the people of one's parish are unaware of the reservation of sins can a pastor for a sufficiently grave reason absolve them, outside the cases contemplated by canons 899, § 3, and 900, in virtue of canon 209?

#### EXAMUSSIM

In the canons mentioned in the proposed question, the Code either makes specific concession of jurisdiction<sup>1</sup> or deprives the reservation of its effect.<sup>2</sup> Outside the cases considered in the respective canons just noted, does canon 209 give the confessor the power to absolve from reserved sins?

One should first ask whether it is lawful to absolve penitents who are actually under the influence of common error in this regard? Authors are in agreement that the confessor may not even indirectly cause the common error.<sup>3</sup> But if the common error exists without the intervention of the confessor as its cause, the common

<sup>1</sup> Can. 899, § 3. Ipso iure a casibus, quos quoquo modo sibi Ordinarii reservaverint, absolvere possunt tum parochi, aliive qui parochorum nomine in iure censentur, toto tempore ad praeceptum paschale implendum utili, tum singuli missionarii quo tempore missiones ad populum haberi contingat.

<sup>2</sup> Can. 900. Quaevis reservatio omni vi caret:

1° Cum confessionem peragunt sive aegroti qui domo egredi non valent, sive sponsi matrimonii ineundi causa;

2° Quoties vel legitimus Superior petitam pro aliquo determinato casu absolvendi facultatem denegaverit, vel, prudenti confessarii iudicio, absolvendi facultas a legitimo Superiore peti nequeat sine gravi poenitentis incommodo, aut sine periculo violationis sigilli sacramentalis;

3° Extra territorium reservantis, etiamsi dumtaxat ad absolutionem obtinendam poenitens ex eo discesserit.

<sup>3</sup> Cf. Vermeersch, *Theologiae Moralis Principia, Responsa, Consilia* (2. ed., 4 vols., Romae: Università Gregoriana, 1926-1928), III, n. 494, 6. Noldin-Schmitt regard as licit the absolution given by a confessor on the morning of a feast when a large crowd of penitents approach him at his confessional, if he then remembers that his faculties have expired and there is no opportunity of obtaining the renewal of them in good time; but they would not extend their solution to the case in which one or the other penitent would approach the confessor on an ordinary day; cf. *Summa Theologiae Moralis*, III (28. ed., Munich-Heidelberg, 1945), n. 347.

opinion of authors admits that the use of the supplied jurisdiction is lawful but only when justified by a grave reason.<sup>4</sup>

In the hypothesis that a grave reason would justify the use of supplied jurisdiction in a given case, the question arises whether common error exists as to the fact that a confessor does not possess jurisdiction to absolve from reserved sins. One must note that power to absolve from reserved sins is lacking to both the priest who has received no jurisdiction for the hearing of confessions in a given diocese as well as to a priest who has received such jurisdiction. In the case of the former, common error adjudging him a simple confessor would supply the jurisdiction possessed by the latter, but it would not supply the jurisdiction required for the absolution of reserved sins. Nor would it supply this jurisdiction to the priest actually duly authorized as a simple confessor; in this case, the people judge him truly to be what he is, a duly authorized simple confessor. If the people think that special jurisdiction is not needed for the absolution of reserved sins, their error is not an error of fact, but an error concerning a clear and certain law. In this case, there is no supplying of jurisdiction.<sup>5</sup> It follows that the only case in which common error could justify the use of supplied jurisdiction for the absolution of reserved sins would be the case in which the people at large knew of the reservation of the sins and, for some reason, had come to believe that the confessor had received the special jurisdiction requisite, when as a matter of fact he had not received it.<sup>6</sup>

<sup>4</sup> Cf. Coronata, *Institutiones Iuris Canonici*, I, n. 293; Kearney, *The Principles of Delegation*, The Catholic University of America Canon Law Studies, n. 55 (Washington, D. C.: The Catholic University of America, 1929), p. 138. Vermeersch (*ibid.*, n. 493, 5) admits public advantage as justifying it, citing the example of a missionary priest who, while giving a public mission, suddenly realizes that the requisite jurisdiction was not obtained for him, but requiring that the faculties be sought as soon as possible.

<sup>5</sup> Cf. Miaskiewicz, *Supplied Jurisdiction according to Canon 209*, The Catholic University of America Canon Law Studies, n. 122 (Washington, D. C.: The Catholic University of America Press, 1940), pp. 163-167.

<sup>6</sup> Cf. Miaskiewicz, *ibid.*, pp. 305-310. Kelly holds that common ignorance suffices as a foundation for supplied jurisdiction, even when the confessor only thinks that it exists, if his judgment is prudent and honest; cf. Kelly, *The Jurisdiction of the Confessor according to the Code of Canon Law*, The Catholic University of America Canon Law Studies, n. 43 (Washington, D. C.: The Catholic University of America, 1927), pp. 105-111. This view is opposed

## RESERVED SINS AT EASTER TIME

If a penitent should approach me as a pastor on the evening of the Ember Saturday of Lent with a sin reserved in our diocese, would I be obliged to question him as to whether the confession he was making contemplated immediate preparation for his fulfillment of the Paschal Precept in order that I might be authorized to absolve from the reserved sin?

TENERITAS

The proper time for the fulfillment of the Paschal Precept is relevant to the adequate response needed in this question. It is to be observed that according to canon 859, § 2, the period for complying with this obligation extends from Palm Sunday to Low Sunday. The law authorizes local ordinaries, however, to extend this period, should circumstances warrant it, but so as to restrict it within the time between the Fourth Sunday of Lent and the Feast of the Most Holy Trinity. As to the United States, it is affirmed in the decrees of the II Plenary Council of Baltimore<sup>1</sup> that Pius VIII by an indult of September 26, 1830, extended the period to include that between the First Sunday of Lent and Trinity Sunday. The Council relates that the reasons for the indult were the scarcity of priests, the extent of the territory to be served by them, and the already existing custom. The language of the Council seems to express the hope that when the number of priests reaches that required by the needs of the faithful, the universal discipline shall be reinstated. Augustine argues that this extension of time ceased with the promulgation of the Code.<sup>2</sup> Woywod, on the other hand, contends that the indult is preserved intact in virtue of canon 4.<sup>3</sup>

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to the traditional pre-Code attitude; now, according to canon 6, 2°, 4°, it seems unwarranted that one should depart from the pre-Code interpretation. As a consequence, one can scarcely admit that the more liberal view is sufficiently probable to create a doubt of law; cf. Miaskiewicz, *ibid.*, pp. 151-156. Thus one is precluded from using the latter view as allowing the use of supplied jurisdiction in a case in which the faithful would be prudently and honestly judged to lack knowledge of the reservation of sins or of the need for special jurisdiction for the absolution of reserved sins.

<sup>1</sup> *Acta*, n. 257.

<sup>2</sup> *A Commentary on the New Code of Canon Law* (8 vols., St. Louis: B. Herder Book Co., 1918-1922), IV, on can. 859, § 2.

<sup>3</sup> Woywod, *A Practical Commentary on the Code of Canon Law* (2 vols., New York, 1925, I, 414.

Barrett accepts the contention that the custom has become immemorial and that it can be tolerated until the local ordinary deems it should be removed.<sup>4</sup>

In the United States, therefore, on the Ember Saturday of Lent pastors have the faculty, in virtue of canon 899, § 3, of absolving from sins reserved by the ordinary, since the faculty may be used within any lawful extension of the period specified in canon 859, § 2.

Moreover, since pastors may use this faculty even in behalf of penitents who are not preparing, through the confession they are making, for the fulfillment of the Paschal Precept, they need not seek from the penitent information concerning the relation between their present confession and the Paschal Precept.<sup>5</sup>

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### NYLON VESTMENTS?

In a Catholic Church Goods store I heard a priest ask for nylon vestments. Are nylon vestments being made? Do they comply with the requirements of the liturgy?

SPECULATRIX

The maniple, the stole, and the chasuble are required to be of silk. At the end of the last century, the Sacred Congregation of Rites was approached on two different occasions with a petition that an exception be made. In 1882 it granted a request in favor of churches of the poor in virtue of which linen, cotton or wool could be used with silk, provided that the external surface is silk.<sup>1</sup> In 1893, it permitted the use of a mixture of silk and moire.<sup>2</sup> From

<sup>4</sup> Cf. can. 5; Barrett, *A Comparative Study of the Third Plenary Council of Baltimore and the Code*, The Catholic University of America Canon Law Studies, n. 83 (Washington, D. C.: The Catholic University of America, 1932), pp. 123 f. Cappello argues that the time for the fulfillment of the precept of the annual communion cannot be extended by custom because of the element of the divine law involved in it, an element which, however, is not involved in the obligation of receiving the annual communion within a limited portion of the year; cf. Cappello, *Tractatus Canonico-moralis de Sacramentis*, I (3. ed., 1938), n. 476, 3.

<sup>5</sup> Cf. Cappello, *op. cit.*, II, pars I (3. ed., 1938), n. 599; Coronata, *Institutiones Iuris Canonici*, I, n. 405.

<sup>1</sup> Decr. 23 mart. 1882—*Decreta Authentica*, n. 3543.

<sup>2</sup> Decr. 21 apr. 1893—*Decreta Authentica*, n. 3796.

the foregoing it seems warranted to conclude that the vestments enumerated above cannot be made of nylon.

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## APOSTOLIC INDULGENCES AND PLASTIC BEADS

Can the Apostolic indulgences be attached by one enjoying the proper faculties to rosary beads made of plastic material?

CONFERTUS

In announcing the list of indulgences that are to be considered Apostolic indulgences for his reign, Pope Pius XII specified that they be attached to beads, rosaries, crosses, crucifixes, small statues, and medals, provided they are not made of tin, lead, glass which is inflated and hollow, or any similar material which can be easily broken or worn out.<sup>1</sup> Plastic beads seem to be as solid and compact as solid glass. Therefore one concludes that the indulgences may be attached to them.

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## ARE NURSES "WORKINGMEN"?

At the hospital where I am chaplain there is a tradition of long standing in virtue of which the student nurses are universally regarded as exempt from the obligation of abstaining from meat all during Lent except on Fridays, Ash Wednesday, Good Friday, Holy Saturday, as well as on all other days of abstinence throughout the year except Fridays and the vigil of Christmas. Was this application of the Workingmen's Indult to the nurses justified?

ANALOGIFERENS

It could be argued from a response of the Sacred Penitentiary of March 9, 1925,<sup>1</sup> relating to persons privileged to gain the jubilee indulgence outside Rome, that "white collar" workers should not be regarded as entitled to the dispensation contained in the Work-

<sup>1</sup> S. Paenit., 11 mart. 1939—AAS, XXXI (1939), 132. This declaration added to the similar declaration made by Pius XI at the beginning of his reign a clause modifying *glass*, i.e., *which is inflated and hollow*. This clause was undoubtedly suggested by the interpretation given by the reply of the Sacred Penitentiary on December 21, 1925, which brought the restriction into harmony with a declaration of the Sacred Congregation of Indulgences of February 29, 1820 (ad 2), which allowed indulgences to be attached to glass beads, provided that the latter were made of solid and compact glass; cf. declaration of Pius XI (February 17, 1922)—AAS, XIV (1922), 143; interpretation of the Sacred Penitentiary (December 21, 1925)—AAS, XVIII (1926), 24.

<sup>1</sup> AAS, XVII (1925), 327.

ingmen's Indult. Indeed, even apart from the analogy drawn from that response there is strong intrinsic evidence in the indult itself to suggest that only manual laborers were intended to be the recipients of the favor it granted.

This indult was granted by the Sacred Congregation for the Propagation of the Faith, March 15, 1895. It was privately granted to Cardinal Gibbons for all the ordinaries of the United States. But its very terms prove that it was issued *distributive* and not jointly to the body of the hierarchy as such. It was valid for ten years. It seems to have been renewed at its expiration up to 1933, for on February 2, 1932, the Most Reverend Apostolic Delegate informed the hierarchy that it had been extended for one year (along with the indult substituting the Wednesday of Lent for the Saturday of Lent as a day of abstinence), and on April 21 of the same year he advised that it was the desire of the Sacred Congregation that in the future ordinaries should apply individually and directly for the renewal of these indults.<sup>2</sup> The renewal of the indult for the Archdiocese of Chicago on April 3, 1937, excepted from the faculty permitting the substitution of Wednesday for Saturday abstinence, not only the Saturday of Ember Week but also Holy Saturday.

Perhaps it is correct to conclude that the Workingmen's Indult is inoperative at the present time. The indult of December 19, 1941, was so extensive as to permit all that the Workingmen's Indult granted, since in the matter of dispensation from the laws of fast and abstinence, it limited the discretion of the local ordinaries only on Ash Wednesday and Good Friday.<sup>3</sup> On January 28, 1949, a decree of the Sacred Congregation of the Council limited it further by requiring that all Fridays be observed as days of abstinence and that the vigils of Christmas and of the Feast of the Assumption be observed as days of fast and abstinence.<sup>4</sup>

<sup>2</sup> Cf. Bouscaren, *The Canon Law Digest*, I, 591, 592; II, 364, 381; *THE JURIST*, I (1941), 145, 146; VI (1946), 91-93; X (1950), 63, 64; *The Ecclesiastical Review*, LXXX (1929), 187; Barrett, *A Comparative Study of the Third Plenary Council of Baltimore and the Code*, pp. 149-151.

<sup>3</sup> Cf. S.C. Neg. Eccl. Extr., 19 dec. 1941—AAS, XXXIII (1941), 516; *THE JURIST*, II (1942), 388; Bouscaren, *op. cit.*, II, 363.

<sup>4</sup> Cf. S.C.C., decr. 28 jan. 1949—AAS, XLI (1949), 32, 33; *THE JURIST*, IX (1949), 263.

If the Workingmen's Indult is operative in any diocese in the United States, its extension can best be understood by the interpretation given it by the local ordinary in publishing his Lenten regulations, because it is within his power to give it a wide interpretation inasmuch as it is a general faculty. However, he can get little help from the authors, since those who have written on the subject are scarcely of sufficient weight to give extrinsic authority to their opinions. Of course, if the local ordinary dispenses in virtue of the indult of December 19, 1941, as modified by the decree of January 28, 1949, the interpretation of the extent of his dispensation must be gathered from his own explicit words in his Lenten regulation or from a fair construction of his intention reached by a consideration of the text and the context of the aforesaid regulations.

If it can be gathered from the Lenten regulations that the local ordinary wished to dispense student nurses from the obligation of abstaining from meat on most of the days of abstinence, exclusive of Fridays and other days excepted in the Roman Indults, then they are safe in conscience in availing themselves of this dispensation.

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## THE POWER OF CONFESSORS IN REGARD TO THE LENTEN FAST

In some Lenten regulations the following statement appears: "Those who doubt whether they are excused from fasting or not should consult their confessor." If such persons approach assistants in a parish or chaplains of a hospital and ask for a dispensation because it is apparent to the confessor that they are not excused from fasting, what is the confessor to do?

FLEXUOSUS

Pastors are authorized to dispense from the law of fast in individual cases. This power extends to visitors who come into his parish as well as to his subjects when they are outside his territory.<sup>1</sup> Pastors can even dispense themselves. A confessor enjoying only delegated power to be exercised in his capacity of confessor cannot dispense himself, since he cannot hear his own confession.

<sup>1</sup> Can. 1245, § 1. Non solum Ordinarii locorum, sed etiam parochi, in casibus singularibus iustaque de causa, possunt subiectos sibi singulos fideles singulasve familias, etiam extra territorium, atque in suo territorio, etiam peregrinos, a lege communi de observantia festorum itemque de observantia abstinentiae et ieiunii vel etiam utriusque dispensare.

The language of Lenten regulations as reported in the submitted case does not contain a delegation of power authorizing confessors to grant dispensations. It refers the faithful to the confessor with a view of providing them with expert advice as to the existence of possibly exempting circumstances in their daily lives.

Since the power of the pastor is ordinary power he can delegate his assistant or any other cleric to act under it. He can restrict his assistant to the use of the delegation in the sacramental forum. He can delegate it *ad universitatem causarum* in virtue of canon 199, § 1.<sup>2</sup> If a confessor has such power delegated him by the pastor, he can use it in behalf of the subjects of the pastor and of those who are actually within the parish. If the delegation of the pastor allows the use of the faculty in the extra-sacramental forum, the delegated person can even dispense himself, as was just noted in the the case of the pastor who was said to be able to do this in virtue of his ordinary power.

The faculties granted by the local Ordinary should be inspected in this connection. It is possible that they contain such a delegation of the requisite power.

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### CELEBRATION OF THE MASS OF A "BEATUS"

May the Mass of a "Beatus" be celebrated by a diocesan priest who is resident chaplain of a local diocesan high school where Brothers or Sisters have an indult entitling them to observe the feast of a "Beatus" of their institute?

#### DIVERSITAS

In churches, public oratories, and primary semi-public oratories, the celebrant follows the calendar of the place.<sup>1</sup> But an indult permitting the celebration of the feast of a "Beatus" is not equivalent to the granting of an exception to the ordinary requirements of the calendar.<sup>2</sup> This is made very apparent by a decree of the Sacred Congregation of Rites issued in 1895 in which it was stated that the Sacred Congregation was making a general norm to effect what had previously been accomplished by the insertion of a special rule in special indults. In virtue of this provision, in churches and public

<sup>2</sup> Can. 199, § 1. Qui iurisdictionis potestatem habet ordinariam, potest eam alteri ex toto vel ex parte delegare, nisi aliud expresse iure caveatur.

<sup>1</sup> S.R.C., decr. 11 febr. 1910—*Decreta Authentica*, n. 4248.

<sup>2</sup> Cf. S.R.C., 20 dec. 1679—*Decreta Authentica*, n. 1130.

oratories of regulars who enjoy the privilege of observing the feast of a "Beatus" of their institute, even priests who do not belong to the institute may celebrate the Mass of that "Beatus" just as the members of the institute are permitted to do.<sup>3</sup>

This concession is hedged about by two restrictions. First of all it contemplates a privilege given *regulars*, not that of other religious. Then, the Mass of the "Beatus" can be celebrated only when it is offered in a church or a public oratory; no mention is made of a semi-public oratory.

Because of the limited character of the concession, it is readily concluded by way of contrast that in the case of an institute of Brothers or Sisters who are not regulars the privilege cannot be used even in their churches or public oratories, much less in their semi-public oratories.

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### UNAUTHORIZED BLESSING BY SEMINARIAN

Thinking him to be a priest, several children ask a seminarian in minor orders to give them his blessing. This he does, using the formula customarily employed by a priest on such occasions. Afterwards he is asked to bless some scapular medals for them, which he does by making over the medals a simple Sign of the Cross. Does the seminarian incur irregularity by either of these actions?

#### SIMULACRUM

Cappello believes that there is usurpation of an order if one solemnly exercises it in performing an action attached to it by ecclesiastical law as well as by divine law. Thus he thinks it likely that one who is not a bishop or not duly authorized is guilty of such usurpation when he consecrates a chalice. Since he is guilty of the usurpation, he incurs the irregularity specified in canon 985, 7°. For the same reason, he thinks that the irregularity is incurred by one who, lacking the order of priesthood, would employ the constitutive blessings to bless candles, ashes, or palm. However, he admits that there is a *dubium iuris* in regard to both the consecrations and the blessings just described in reference to the effect of an irregularity resulting from their usurpation. Since that is so, the irregularity should be considered as not incurred.

<sup>3</sup> Cf. S.R.C., *Urbis et Orbis*, 9 dec. 1895—*Fontes*, n. 6248.

But with regard to blessings that are merely reserved to pastors, religious institutes, or other associations, Cappello admits that the giving of such blessings does not constitute the usurpation of the order of the priesthood.<sup>1</sup>

A constitutive blessing is one by which a thing or a person is set aside for the service of God or religion. A blessing given the people for their spiritual or temporal welfare is, on the other hand, an invocative blessing.

It might be argued that the blessing of the scapular medal is a constitutive blessing.<sup>2</sup> On the other hand, the Holy See could have permitted the wearing of an unblessed medal instead of the scapular on the part of one duly enrolled and invested. From this it seems that the wearing of the medal is a *conditio sine qua non* for the sharing of privileges and that it is not the medal itself that imparts the favors. It is readily apparent that the blessing given without the faculty for doing so does not have the effect of making the medal a substitute for the scapular. But this would be true even if a priest gave the blessing in the absence of the proper faculty. The blessing seems also a *conditio sine qua non* rather than a positive source of spiritual privilege in itself. It seems to be in the same category as a devotional object to the use of which an indulgence has been attached; the use of the devotional article is a condition for the gaining of the indulgence. For this reason one is inclined to doubt whether the blessing of a scapular medal is constitutive.

In view of the foregoing one seems justified in concluding that the seminarian did not incur an irregularity through either of the blessings he conferred.

Even if the blessing of the scapular medal be regarded as constitutive, there is still a doubt of law which justifies the conclusion that the seminarian did not incur an irregularity for imparting it. There would seem to be some obligation arising from the virtue of charity to remove the erroneous belief that the scapular medals had been properly blessed.

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<sup>1</sup> Cf. Cappello, *Tractatus Canonico-moralis de Sacramentis*, II, pars III (Taurinorum-Augustae: Marietti, 1935), n. 510.

<sup>2</sup> Cf. S.C.S.Off., decr. 16 dec. 1910—AAS, III (1911), 22; declar. 16 dec. 1910—*ibid.*, p. 24.

## PRIVATE INTERPELLATIONS

After receiving baptism, a previously unbaptized convert informs her infidel husband of the fact of her conversion and asks if he will permit her to practice her religion. His reply is a decided negative, and shortly afterwards he deserts his wife because of her becoming a Catholic. Subsequently wishing to contract marriage with a Catholic, the convert conceals the fact of the former marriage out of fear that it will prevent her marrying the Catholic. The second marriage then takes place before a priest. Is the convert's private interrogation sufficient for valid interpellations; and is the second marriage valid even without the knowledge of ecclesiastical authorities that a case of the Pauline Privilege is involved?

## PENETRALIA

After the fact there can be no doubt that interpellations made privately are valid. However, privately made interpellations are not always lawful. In certain contingencies, on the other hand, they are lawful, as in the case in which the unbeliever places a barrier to the duly authorized interpellations by refusing to heed a legal summons or to be interviewed by the local ordinary or his auditor. Of course, it may be difficult for the convert to establish in the external forum that he has acted lawfully and validly in the making of the interpellations which he alleges were directed by him to the unconverted spouse. This difficulty would, before the fact, more than likely prevent his use of the Pauline Privilege, since the authorities need to be satisfied that the interpellations were lawfully and validly made before they allow it.<sup>1</sup> The problem is anticipated and solved by the provision of canon 1122, § 2, which shows the importance of the presence of at least two witnesses when the interpellations are made or of at least some other legal means of proof.

After the fact, moreover, presumption favors the validity of the marriage in virtue of canon 1014 and the presumption is not overthrown by the mere lack of evidence showing that the interpellations, made privately, were invalidly made.<sup>2</sup>

In the case presented, therefore, the marriage cannot be declared invalid simply because the interpellations were privately made. Nor can it be regarded as invalid simply because the Church

<sup>1</sup> Cf. Ayrinhac-Lydon, *Marriage Legislation in the New Code of Canon Law* (New York: Benziger Bros., 1946), n. 293.

<sup>2</sup> Cf. Cappello, *Tractatus Canonico-moralis de Sacramentis*, III (2. ed., Taurinorum-Augustae: Marietti, 1927), n. 779.

authorities were not cognizant of the fact that the Pauline Privilege was involved. Cappello calls certain the opinion that converts to non-Catholic sects can use the Pauline Privilege.<sup>3</sup> In their case, Church authority would not be made aware of its use. Of course, non-Catholics would be involved in the problem of making the interpellations of which they know nothing and thus their attempts to use the Pauline Privilege would be frustrated.<sup>4</sup>

The fact that the woman probably did not know, when she asked her infidel husband whether he would permit her to practice her religion, that she was making interpellations in the juridic sense seems not to deprive them of their juridic value. It is possible, of course, that her consent to the marriage in question may have been vitiated by her doubt as to her freedom to marry. However, as canon 1085 states, even the knowledge that the marriage is invalid does not exclude the sufficiency of the consent given to it. The presumption clearly favors the validity of the marriage even on this score.

In the case of the interpellations themselves, the case indicates that only one was made. On the other hand, the conduct of the man in response to it and subsequent to it quite clearly establishes the fact that he gave a very definite, if implicit, reply to the question whether he himself wished to be converted. No one asks questions simply to hear his voice. How impatient anyone becomes when he finds that his interrogator already knew the answer to the question he asked!

The problem remaining is that which was intimated in the very first paragraph of the foregoing: can the woman's statements be taken at their face value? As to the declaration of the invalidity of the marriage, her statements raise a presumption for validity that must be satisfactorily rebutted. As to the continuance of her marital relationship it seems that the interpellations should now be made, or a dispensation from the making of them should be obtained, and the consent renewed.

JEROME D. HANNAN

THE CATHOLIC UNIVERSITY OF AMERICA

<sup>3</sup> *Ibid.*, n. 769.

<sup>4</sup> Cf. Cappello, *loc. cit.*

# Decrees and Decisions

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## CANONICAL

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### MINUTES OF ROMAN MEETING PREPARATORY TO THE III PLENARY COUNCIL OF BALTIMORE

November 13, 1883

In the presence of His Eminence, the Cardinal Prefect of the Sacred Congregation of the Faith, a meeting was held to treat of affairs affecting the Church in the United States of North America. Present at the meeting besides the aforesaid Cardinal Prefect of the Sacred Congregation for the Propagation of the Faith, were His Eminence, Cardinal Franzelin, His Eminence, Cardinal Tambini, all the Archbishops and Bishops summoned from North America, Most Rev. Sepiacci, Bishop of Callinico, as Consultor, and the undersigned Secretary of the Sacred Congregation.

After the customary prayers were said, His Eminence, the Prefect, gave a brief address, in which he said that His Holiness, Leo XIII, from the very beginning of his pontificate had turned his eyes towards the American Church, and that he was pleased with the progress and the growth of the Catholic religion there and with the activity and the zeal of the bishops governing it; that the Supreme Pontiff desired that this progress of the true Church of Christ should become even greater and that the already glorious Church should acquire a definite and solid stability; that the Pontiff knew that much had already been done towards this end, especially by the II Plenary Council of Baltimore, in which excellent decrees were enacted, but that he had discovered also that in the decrees of the aforesaid Council there was a great deal that needed explanation, and that much was wanting to provide for the present condition of the Church. Consequently it was the desire of His Holiness that a new Plenary Council should be held, in which there might be enacted legislation necessary or opportune for the government and progress of the American Church.

His Eminence, the Prefect, added that the Supreme Pontiff had ordered that the Sacred Congregation for the Propagation of the Faith should institute certain preparatory discussions concerning those matters which should be the object of legislation in the forthcoming Plenary Council; that what the Sacred Congregation thought should be embodied in it should be proposed to the Archbishops and Bishops summoned to Rome with the purpose of exchanging views and of thus establishing in advance the legislation that should be adopted in the forthcoming council. The Cardinal Prefect laid emphasis on the freedom enjoyed by the Most Reverend Archbishops and Bishops in offering their views regarding the matters submitted for their consideration and in making other suggestions which their zeal shall convince them are apropos.

## I

### THE TRAINING AND THE INSTRUCTION OF CLERICS

Thereupon there was opened the discussion on the first chapter of the agenda, namely, the training and the instruction of clerics (*De clericorum educatione et instructione*). Attention was first given to the question of the establishment of villas as summer residences to obviate the necessity of sending seminarians to their homes during the periods of vacation. The Most Reverend Archbishop of Baltimore was of the opinion that the council should not make any enactment in this matter but that the problem should be confided to the judgment of the Bishops and this for the principal reason that the enjoyment of the greater degree of freedom in this matter on the part of the seminarians afforded a better method of trying their vocation; if, on the other hand, it is true that seminarians might thus lose their vocation, it is preferable that this should occur before their promotion to sacred orders than afterwards. The Most Reverend Coadjutor Bishop of St. Louis [Patrick J. Ryan, subsequently Archbishop of Philadelphia] stated that the customs of the United States were against the maintenance of villas and that the poverty of the dioceses prevented their establishment.

The Cardinals made many sage comments on the position taken by the Most Reverend Archbishop of Baltimore, insisting on the necessity of protecting seminarians from the loss of their vocation and pointing to the fact that this can more easily happen when they are still lacking in experience and in training while it is less proba-

ble after they have received their complete education. They noted further that the poverty of the dioceses did not constitute an adequate justification for passing over their establishment, since this was proposed as a project for only the principal seminaries. At least for the moment.

The conclusion reached in the matter was this: the establishment of villas was to be strenuously recommended in the council and every effort was to be made for the acceptance of the recommendation. There were to be laid down in the council appropriate rules which the seminarians were to observe while residing at home, chief among which is this that they shall be subject to the direction and the vigilance of their pastors and that the latter, at the end of the vacation period, shall conscientiously inform the Bishop on the moral character and the habits of the seminarians, on the frequency with which they received the sacraments, on their attendance at divine services, and on the wearing of the clerical garb.

Next in order of treatment was the subject of the studies required in the major seminaries. The Most Reverend Archbishops and Bishops concurred in the recommendations of Cardinal Franzelin as follows: 1) faculties were to be established or properly organized, especially in reference to the curriculum in philosophy and theology; 2) the course in philosophy was to extend over two years and that in theology, over four years; 3) textbooks were to be assigned for the use of the seminarians and they were to be of such a character that they contained the entire substantial subject matter of the respective field, lacking nothing beyond an explanation to be furnished by the professors; 4) duly qualified professors were to be appointed.

It was also proposed that seminary deputies should be established in accordance with the wish of the Council of Trent; one group of them to be assigned to the care of the spiritual concerns of the seminary; another group, to the supervision of the temporal administration. No determination was made regarding the number of deputies, but it was said that there should be at least one for the spiritual and another for the temporal interests of the seminary. The appointment of the deputies was to be governed by the norm which entrusted the appointment of one of them to the Bishop, the appointment of the other, to the chapter or the clergy.

The establishment of seminaries came up next for consideration. Because it seemed impossible to impose on every Bishop the obligation of establishing his own seminary, it was said that there must be insistence on the observance of the decrees enacted in this matter by the II Plenary Council of Baltimore which required that when Bishops had no seminary of their own they should take counsel with the Archbishop and the other Bishops of the province in order that they might provide for at least one central seminary to which they might send their seminarians.

The same was said in the matter of minor seminaries, but with the proviso that Bishops should first make every possible effort to establish their own minor seminary; but as long as they are unable to do this, they are to send their seminarians to the central minor seminary of the province.

It was also said that in the council it is to be made a matter to be highly recommended or even to be imposed as an obligation that Bishops provide the seminaries with only the best of spiritual directors and of superiors charged with the burden of the training of the clerics.

It was said further that in the council it was to be recommended that Bishops should send some of their clerics to seminaries in which advanced training was available, particularly to the North American College in Rome and to the American College at Louvain.

The subject matter to be included in the curricula of the major seminaries was said to be, in the course of philosophy, the principal natural sciences, as well as rational philosophy; in the course of theology, dogmatic and moral theology, biblical exegesis, church history, and at least the elements of canon law. Latin was to be the language in which rational philosophy and the sacred sciences were to be taught.

## II

### CHAPTERS AND PARISHES

The Most Reverend Archbishop of Baltimore in the name of all his colleagues said that it was not expedient to establish chapters but that the place of a chapter could be adequately filled by a body of diocesan consultors. He agreed to the establishment of parishes of irremovable tenure but under the following conditions: 1) that the decision regarding the fitness of appointees be left to the

Bishop; 2) that the appointees should submit to a concursus; 3) and that the appointees should not be eligible until they had labored successfully for ten years in the ministry in one of the churches of the diocese.

The conditions proposed in regard to the appointment of pastors of irremovable tenure were accepted by all. But the Cardinals insisted in opposition to the opinion of the Most Reverend Archbishop of Baltimore that it was desirable to appoint canons and to establish chapters, noting that in the existing state of the Church in the United States it would be about the same thing to designate canons as to appoint consultors and that the only distinction lay in this that the canons would enjoy permanent tenure while the consultors would be removable at the wish of the Bishop. The Cardinals explained what should be the character of the chapters and what duties should be assigned the canons. Thus there were resolved certain doubts and thus certain difficulties were eliminated.

There were read the rules according to which the concursus for parishes is conducted in Germany and a copy was given the Most Reverend Archbishops that they might see if they could be applied to their dioceses. Moreover, there was shown a list of cases in which Bishops are bound by law to obtain and to give due consideration to either the advice or the consent of the chapter or of the consultors. Further it was demonstrated that under the law examiners to serve in the concursus examination of appointees to parishes and in the examination of candidates for ordination must be designated in the diocesan synod or, outside the synod, by the Bishop with the consent of the chapter or the consultors. The examiners who are appointed were bound, it was explained, to take an oath faithfully to discharge the duties of their post and to refrain from the acceptance of gifts on the occasion of an examination.

It was also said that there should be designated at least six examiners of the clergy. It was stated further that appeal should be available against the decision of the examiners, as well as against the decision of the Bishop himself.

Bishops would be permitted to admit to orders those who were trained and instructed in private seminaries, provided there was no other obstacle preventing it and provided that the latter were approved by the diocesan examiners. Candidates belonging to re-

ligious orders could also be examined by the examiners as a preliminary to the promotion to orders.

Private seminaries established by secular priests were required to be subject to the jurisdiction of the local ordinary, while the latter enjoyed the right of inspection and vigilance which he was not only able but also required to exercise. This was not true, however, in the case of seminaries or colleges of religious orders; for these special norms had to be observed.

### III

#### THE METHOD FOR PROPOSING TO THE HOLY SEE THE NAMES OF CANDIDATES FOR VACANT DIOCESES

The Most Reverend Archbishop of Baltimore in his own name and in the name of his colleagues said that the plan proposed was acceptable, with only this observation that the Archbishop should preside over the meeting of the clergy or one of the suffragans delegated by the Archbishop; if the candidate was to be proposed for a vacant Archdiocese, then the senior suffragan Bishop should preside or, in case he could not, one of the other Bishops delegated by him. This proposal of the Most Reverend Archbishop was accepted without objection.

Note: In reference to the second chapter, i.e., on chapters and parishes, the Most Reverend Archbishops and Bishops said that they wished to re-examine the question before giving a final response.

[Here closed the first session held November 13, 1883.]

November 16, 1883

In the presence of His Eminence the Cardinal Prefect of the Sacred Congregation for the Propagation of the Faith a meeting was held for the purpose of dealing with matters affecting the Church in the United States. There were in attendance all those who attended the previous meeting and in addition, in virtue of an Apostolic indult, Rev. James Corcoran.

After the usual prayers, the Most Reverend Archbishop of Oregon [Charles J. Seghers] asked to be advised whether the proposals made by their Eminences the Cardinals of the Sacred Congregation were subject to modification either by the Archbishops and Bishops

then and there present in Rome or by the Fathers of the forthcoming Plenary Council.

The reply was in the affirmative and their Eminences gave a rather extensive explanation of their response in accordance with the declaration already made by His Eminence, the Prefect, in his first address, and they said that neither had their Eminences, the Cardinals, issued definitive norms affecting the proposed questions nor was it the scope of the present sessions to do this, but that this was left to the council itself, with some exceptions which would be specified in due time.

The Most Reverend Coadjutor of New York [Michael A. Corrigan] asked the following questions:

1) Whether seminarians who are permitted to go to their homes during the vacation period would be required to bring with them on their return to the seminary testimonial letters from only their own pastor or also from other pastors with whom or in whose parishes they resided?

2) Whether Bishops who do not have a seminary of their own would be obliged to send their clerics to the seminary of their own province or whether they would be allowed to send them also to other seminaries in which the charges were not so great?

The reply given the first question was that seminarians on their return to the seminary should bring with them the testimonial letters of that pastor to whose direction and vigilance they were confided; but if the latter should need information from other pastors, he will be obliged to obtain it in order that he may properly enlighten the Bishop.

In reply to the second question it was stated that Bishops who do not have a seminary of their own may, as an ordinary rule, indeed in virtue of a right, send their seminarians to any other qualified seminary; but that it must be insisted that first-rate seminaries should be established in every province to enable the Bishops to send their clerics to them.

The Most Reverend Bishop of Scranton [William O'Hara] said that suffragan Bishops are confronted with a difficulty in sending their clerics to the archiepiscopal seminary inasmuch as the Archbishops do not wish to grant their suffragans a voice in selecting the professors, the directors, etc., in establishing disciplinary rules, and in the administration of the seminary.

Their Eminences replied that this problem was a serious and a very difficult one. They said that there must be agreement on the principle that if the seminaries are archiepiscopal, owned by the archdioceses, the suffragan Bishops could not pretend to any rights in regard to these seminaries, even if they should send their clerics to them. In order that the suffragan Bishops may have rights in regard to any seminary, it would be necessary that they had cooperated in the original establishment and in the maintenance of the seminary, a situation that is not verified simply through the fact that they send their clerics to them and pay a stipend for their training. But if the suffragan Bishops would place themselves under an obligation to send all their clerics to the archiepiscopal seminary, it would seem equitable that the Archbishop should grant them some right in the direction of the seminary, especially since the seminarians remain subject to the jurisdiction of the Bishop by whom they are sent. In order to reach the objective sought by the Most Reverend Bishop of Scranton only two plans are available: 1) that the suffragan Bishops should cooperate in the founding of a provincial seminary, which, from the very fact that it is a provincial seminary, is subject to the jurisdiction and the direction of all the Bishops of the province; 2) that the suffragan Bishops should enter into an agreement with the Archbishop who has a seminary, under the terms of which the property rights of the archdiocese would be secured while the use of the seminary would become common to the whole province. Under the latter plan the suffragan Bishops would be obliged to pay not only the fees charged for the training of their clerics but also to contribute to the sum needed for the maintenance etc. of the seminary. If such an agreement were made, then the suffragan Bishops would acquire a right to intervene in the direction of the archiepiscopal seminary.

The Most Reverend Archbishop of Oregon remarked, in relation to minor seminaries, that according to the wish of the Council of Trent the students accepted were to be aspirants for the priesthood, they should wear the clerical garb and the tonsure, and the poor were to be preferred over the rich; he then asked whether Bishops could prescind from those conditions and accept students without regard to them. It was replied that this was to be left to the prudence and the conscience of the Bishops who were authorized for a justifying reason to prescind from them.

The Eminent Prefect said that the Bishops of North America should obtain accurate information regarding the American College at Louvain, particularly in reference to its patrons and its property, and to refer such information to the Sacred Congregation without taking action on their own initiative.

Thereupon the discussion regarding chapters and pastors was resumed and the Most Reverend Archbishop of Baltimore presented a brief which he read and in which there were offered the reasons impelling him and his colleagues to believe that the establishment of chapters was not expedient. These reasons were: 1) chapters are not in accord with the character of the American people; 2) qualified priests are not readily available because the priests, scattered in districts far removed [from the cathedral], cannot be brought together without serious inconvenience and great expense; 3) it is to be feared that once priests are raised to the rank of canons they will become insolent in their attitude towards the bishop and will seek to demand unwarranted privileges; 4) there is the risk of controversies between the Bishops and the canons, as experience shows to be the case where chapters are in existence.

The Most Reverend Coadjutor of St. Louis added that if those dangers were not present at the moment, they can easily make their appearance in the future.

Their Eminences had a great deal to say in opposition to the arguments thus advanced. They noted in particular that for the present chapters would be established only in those dioceses in which this is possible and that, therefore, the difficulty said to derive from the scarcity of priests could be discounted; moreover, they showed that the chapters to be established would not be moral bodies independent of the Bishops but only their senate and that the danger of unwarranted intervention in the affairs of the diocese would be precluded by the fact that the canons would need to be called together by the Bishop and that they would be restricted in their suggestions to the matters proposed to them by the Bishop. It was stated that chapters such as these exist in England and Holland and that no harm, but rather great benefit, has been the result of their establishment.

The conclusion was reached that in the forthcoming council the question of the establishment of chapters should not be excluded

from its consideration; and that in any event the establishment of diocesan consultors should be imposed on all.

Then consideration was given to the number of consultors and the Most Reverend Archbishop [*sic!*] of Little Rock [Edward Fitzgerald] stated that it would be impossible for him to have more than two consultors, and he said this was true of all the dioceses in the Province of New Orleans.

It was replied that the number of consultors could vary from diocese to diocese; but that if it would be possible to have six, six should be the number appointed; if only four, then four; if no more than two, then two would suffice for the present.

Then the Most Reverend Archbishop of Oregon asked by whom the consultors should be appointed.

The reply was made in accordance with the solution reached for Scotland: namely, that one-half of them should be selected by the Bishop himself while the other half should be appointed also by the Bishop but from names proposed by the clergy.

The Most Reverend Archbishop of Boston [John J. Williams] asked what should be done in case the Bishop should believe that the consultors proposed by the clergy cannot or should not be appointed.

The reply was made that the method of election on the part of the clergy should be the following. The clergy will give the Bishop a list of those priests deemed worthy of appointment to the post of consultor without binding the Bishop to select any of them in particular; then the Bishop would select from that list those whom they prefer. This method was approved by all.

Although in the first session all the Archbishops and the Bishops agreed on the establishment of parishes of irremovable tenure, nevertheless the Most Reverend Archbishop of Oregon asked what was the serious reason that made necessary the establishment in America of parishes of irremovable tenure.

For he remarked that according to a resolution of the Sacred Congregation of the Council parishes of removable tenure should not be changed into parishes of irremovable tenure without a serious reason; moreover, he insisted that in the United States there are no parishes in the proper sense inasmuch as there is no mission in which there are verified the conditions required by law for the existence of a true parish in the canonical sense.

Their Eminences replied by offering the general reason acknowledged by law, as well as special reasons, particularly that of meeting the complaints of priests who desire that stability of tenure be guaranteed them.

The same Most Reverend Archbishop of Oregon said that it is necessary that only a few parishes of irremovable tenure should be established, since, as a result of the mobility of the population in the United States, it can easily happen that in a given place the majority of the people would now be of a certain nationality, now of a different one, and thus there would arise the need of changing the pastors.

It was replied that it is possible that this situation exists in some parts of the United States but not in all parts; and that in any event there are means of providing for the respective cases: namely, either through the appointment of a parochial auxiliary or through the transfer of the pastor to another parish; on the other hand, since the case is not an ordinary one, it cannot interfere with the operation of a general law.

The same Most Reverend Archbishop said that he had many young priests to whom it did not seem wise to entrust parishes of irremovable tenure.

The reply was made that this difficulty is met by the provision that only they can be appointed to parishes of irremovable tenure who have worthily exercised the sacred ministry in the diocese for ten years.

He then asked whether pastors of irremovable tenure should enjoy ordinary or delegated power.

It was replied that they must have ordinary power as is the case with all who are true pastors.

With regard to the designation of those who are to be presented for the episcopate, the Most Reverend Coadjutor of New York asked whether regulars who are rectors should be allowed to cast a vote.

It was replied that regulars who are rectors are not pastors of irremovable tenure even though the church should be perpetually joined to the religious order.

The Most Reverend Archbishop of Boston asked whether the names to be considered by the Bishops would be only those proposed by the clergy or also others proposed by the Bishops.

It was replied that the Bishops should consider both the names proposed by the clergy and also those proposed by themselves; because the voice of the clergy is only consultive; but the Bishops are obliged to reveal to the Sacred Congregation the reasons which prompted them to reject the names proposed by the clergy.

[Here closed the second session held November 16, 1883. The next session convened the next day. The minutes of subsequent sessions will appear in subsequent numbers of THE JURIST.]

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### SUPREMA SACRA CONGREGATIO SANCTI OFFICII NOTIFICATIO<sup>1</sup>

Cum Sac. Stanislaus Bojan, natus "Nowy-Targ" in Polonia die 27 Iulii a. 1919, ad sacrum Presbyteratus Ordinem promotus fuerit falsas exhibens litteras dimissorias, Suprema Sacra Congregatio S. Officii, in Plenario Consessu Feriae IV habito die 29 Martii 1950, decrevit eundem sacerdotem Stanislaum Bojan habendum esse tamquam laicum quoad omnes iuris effectus, solutum ab omnibus obligationibus ex sacra ordinatione contractis.

Datum Romae, ex Aedibus S. Officii, die 14 Iunii a. 1950.

PETRUS VIGORITA, *Supremae S. Congr. S. Officii Notarius.*

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### DECRETUM<sup>2</sup>

#### PROSCRIPTIO LIBRI

Feria IV, die 31 Maii 1950

In generali consessu Supremae Sacrae Congregationis Sancti Officii, Eñi ac Revñi Domini Cardinales rebus fidei et morum tutandis praepositi, praehabito RR. DD. Consultorum voto, praedamnatum esse declararunt, vi canonis 1399 C.I.C., atque in Indicem librorum prohibitorum inserendum mandarunt librum a Curtio Malaparte conscriptum, cui titulus "*La Pelle. Storia e racconto*" (Roma-Milano, Ed. Aria d'Italia, 1949).

Et Feria V, die 15 Iunii 1950, Ssmus D.N.D. Pius Divina Providentia Pp. XII, in Audientia Exeño ac Revño Domino Adessori

<sup>1</sup> AAS, XLII (1950), 489.

<sup>2</sup> AAS, XLII (1950), 489.

Sancti Officii impertita, relata Sibi Eñorum Patrum resolutionem adprobavit et publicari iussit.

Datum Romae ex Aedibus S. Officii, die 16 Iunii a. 1950.

PETRUS VIGORITA, *Supremae S. Congr. S. Officii Notarius.*

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### DECRETUM<sup>3</sup>

#### PROSCRIPTIO LIBRI

Feria IV, die 5 Iulii 1950

In generali consessu Supremae Sacrae Congregationis Sancti Officii, Eñi ac Revñi Domini Cardinales rebus fidei et morum tutandis praepositi, praehabito RR. DD. Consultorum voto, damnarunt atque in Indicem librorum prohibitorum inserendum mandarunt librum qui inscribitur:

Bruno Ughi, *La Via*, 1<sup>a</sup> edizione, Istituto Editoriale Cisalpino Milano-Varese, 1948; 2<sup>a</sup> edizione accresciuta, Firenze, CYA Editore, 1949.

Et die 16 eiusdem mensis et anni, Ssñus D.N.D. Pius Divina Providentia PP. XII, in Audientia Excoñe ac Revño Domino Adessori Sancti Officii concessa, relata sibi Eñorum Patrum resolutionem adprobavit et publicari iussit.

Datum Romae, ex Aedibus S. Officii, die 18 Iulii a. 1950.

PETRUS VIGORITA, *Supremae S. Congr. S. Officii Notarius.*

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### MONITUM<sup>4</sup>

Nonnullae constitutae sunt associationes, impulsu ac ductu, sicut omnibus notum est, partium communistarum, eo spectantes ut pueros puellasque imbuant principiis et institutione, quae materialismum sapiunt et mores christianos religionemque impetunt.

Monentur igitur christifideles huiusmodi associationes, quocumque tegantur nomine, plecti sanctionibus, quas comminatur Decretum S. Officii, latum die 1 Iulii 1949 (A.A.S., 1949, p. 334).

1) Itaque parentes vel eorum locum tenentes qui, contra praescriptum c. 1372, § 2 C.I.C. et memorati Decreti S. Officii, liberos praedictis associationibus instituendos tradiderint, ad Sacramenta recipienda admitti nequeunt.

<sup>3</sup> AAS, XLII (1950), 490.

<sup>4</sup> AAS, XLII (1950), 553.

2) Qui vero contra fidem vel christianos mores pueros ac puellas docuerint, incurrunt in excommunicationem Apostolicae Sedi speciali modo reservatam.

3) Pueri ac puellae autem, quamdiu huiusmodi associationum participes sunt, ad Sacramenta admitti nequeunt.

Datum Romae, ex Aedibus S. Officii, die 28 Iulii 1950.

M. MARANI, *Supr. S. Congr. S. Officii Notarius.*

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## SACRA CONGREGATIO CONCILII

### DECRETUM<sup>1</sup>

#### DE ECCLESIASTICIS OFFICIIS ET BENEFICIIS CANONICE INSTITUENDIS SEU PROVIDENDIS

Catholica Ecclesia, ex ipsius Christi institutione est perfecta Societas hierarchice constituta, cuius plenum et supremum regimen ac iurisdictio est penes Romanum Pontificem, beati Petri Apostoli in primatu successorem. Quapropter nemo in ecclesiastica officia et beneficia se immitti nec alios immittere praesumere potest, sine legitima canonica institutione seu provisione.

Genuinam de hac re iuris canonici normam iam recolebat prima regula iuris in VI: "Beneficium ecclesiasticum non potest licite sine institutione canonica obtineri". Et Concilium Tridentinum decrevit: "eos, qui tantummodo a populo aut saeculari potestate ac magistratu vocati et instituti ad haec ministeria exercenda adscendunt, et qui ea propria temeritate sibi sumunt, omnes non Ecclesiae ministros sed fures et latrones, per ostium non ingressos, habendos esse" (cap. IV, sess. XXIII de reform.). Quin imo eadem sancta Synodus definivit: "Si quis dixerit . . . eos qui nec ab ecclesiastica et canonica potestate rite ordinati nec missi sunt, sed aliunde veniunt, legitimos esse verbi et Sacramentorum ministros, anathema sit" (Ibid. can. VII; cfr. quoque Syllab. Pii Pp. IX, n. 50).

Praeterea haec eadem principia sanxit Codex iuris canonici, statutis quoque poenis contra transgressores (cfr. cc. 2331, § 2; 2334, 1°-2°; 147, § 1-2; 332, § 1; 2394).

<sup>1</sup> AAS, XLII (1950), 601, 602.

Ad eadem sacrosancta principia magis sarta tectaque servanda, simulque ad praecavendos abusos in re tanti momenti, Sanctissimus Dominus Noster Pius Pp. XII statuere dignatus est:

In excommunicationem speciali modo Sedi Apostolicae reservatam ipso facto incurrunt:

1) qui contra legitimas ecclesiasticas Auctoritates machinantur aut earum potestatem quomodocumque conantur subvertere;

2) qui ecclesiasticum officium vel beneficium vel dignitatem sine institutione vel provisione canonica, ad normam sacrorum Canonum facta, occupat vel in eadem sinit illegitime immitti, vel eadem retinet;

3) qui in criminibus nn. 1 et 2 declaratis quovis modo, directe vel indirecte, partem habent.

Quibusvis non obstantibus, etiam speciali mentione dignis.

Datum Romae, die 29 Iunii 1950.

L. ✙ S.

I. CARD. BRUNO, *Praefectus*.

F. ROBERTI, *a Secretis*.

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## SACRA CONGREGATIO CONCILII

### DECRETUM<sup>1</sup>

#### DE VETITA CLERICIS ET RELIGIOSIS NEGOTIATIONE ET MERCATURA

Pluribus ex documentis constat, in Ecclesia quovis tempore clericis in sortem Domini vocatis saecularia negotia, negotiationem praecipue et mercaturam, gravibus sub poenis et censuris prohibita fuisse.

Siquidem ipse Apostolus in II<sup>a</sup> epistola ad Timotheum (cap. II, 4) iam monuit: "Nemo militans Deo implicat se negotiis saecularibus". Nil mirum proinde si Tridentina Synodus (Sess. XXII, cap. I, de reform.), de his agens criminibus decernere non dubitaverit: "ut quae alias a Summis Pontificibus et a sacris Conciliis de clericorum . . . saecularibus negotiis fugiendis copiose ac salubriter sancita fuerunt, eadem in posterum iisdem poenis vel maioribus, arbitrio Ordinarii imponendis, observentur . . .".

His itaque omnino inhaerens Codex iuris canonici, ad rem quod attinet, canone 142 statuit: "Prohibentur clerici per se vel per alios

<sup>1</sup> AAS, XLII (1950), 330.

negotiationem aut mercaturam exercere sive in propriam sive in aliorum utilitatem". Haec autem prohibitio afficit etiam religiosos ad normam canonis 592. Quin imo idem Codex hoc praescriptum canone 2380 peculiaribus etiam sanctionibus munivit, addens: "Clerici vel religiosi mercaturam vel negotiationem per se vel per alios exercentes contra praescriptum canonis 142 congruis poenis pro gravitate culpa ab Ordinario coerceantur".

Quo firmior et magis uniformis ecclesiastica disciplina hac de re habeatur atque abusus praecaveantur, Sanctissimus Dominus Noster Pius Pp. XII statuere dignatus est ut Clerici et Religiosi omnes ritus latini de quibus in canonibus 487-681, ne exceptis quidem recentium Institutorum saecularium sodalibus, per se vel per alios, mercaturam seu negotiationem cuiusvis generis, etiam argentariam, exercentes, sive in propriam sive in aliorum utilitatem, contra praescriptum can. 142, utpote huius criminis rei, excommunicationem latae sententiae Apostolicae Sedi speciali modo reservatam incurrant et, si casus ferat, degradationis quoque poena plectantur.

Superiores vero qui eadem delicta, pro munere suo ac facultate, non impediverint, destituendi sunt ab officio et inhabiles declarandi ad quodlibet regiminis et administrationis munus.

Pro omnibus denique, quorum dolo vel culpa patrata facinora tribuenda sint, firma semper manet obligatio reparandi damna illata.

Contrariis quibuscumque non obstantibus.

Datum Romae, die 22 mensis Martii, anno 1950.

L. ✠ S.

IOSEPH CARD. BRUNO, *Praefectus*.

F. ROBERTI, *a Secretis*.

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## LITTERAE APOSTOLICAE<sup>1</sup>

FOEDERATIO CATHOLICARUM STUDIORUM UNIVERSITATUM  
CONSTITUITUR

PIUS PP. XII

Ad perpetuam rei memoriam.—Catholicas studiorum Universitates, insignes doctrinae sacrae altiorumque humanarum disciplinarum sedes, Sancta Mater Ecclesia, divinae veritatis magistra ac tutrix, per totum fere orbem condidit, ne, tot repentibus erroribus,

<sup>1</sup> AAS, XLII (1950), 385-387.

tot scholis cum Dei religionisque neglectu vel contemptione institutis, studiosa discipulorum soboles deciperetur et ingentia pateretur animarum detrimenta.

Eadem ergo provida Mater abhinc quindecim praesertim lustra, quibus ad defectionem a Summa Veritate improbe et infense est incitatum usquequaque, omni ope enixa est ut haec scientiae rectique cultus plantaria quam maxime promoveret, virtutibus christianis informaret atque, supremo suo magisterio firmiter inhaerentia, iurium Dei vindicandorum valida efficeret praesidia hominumque tenebris obvolutorum perfugia salutis.

Igitur hae Catholicae studiorum Universitates, inter tot temporum ac rerum difficultates a Sancta Sede excitatae, tardius quidem quod ad numerum, augescebant ac maiores in dies colligebant vires, adeo ut iam totum terrarum orbem rutila luce collustrent; haud secus ac "granum sinapis . . . quod minimum quidem est omnibus seminibus; cum autem creverit, maius est omnibus oleribus et fit arbor ita ut volucres caeli veniant et habitent in ramis eius" (Matth. XIII, 32).

Maximis ergo hisce studiorum domiciliis tam feliciter propagatis, perutile visum est ut eorum magistri et alumni in communem quandam consociationem coalescerent, qua, Summi Pontificis, utpote omnium Patris et Doctoris, auctoritate suffulta, collatis consiliis iunctaque opera lumen Christi impensius diffunderet ac dilataret.

Quocirca factum est ut anno 1924 duodeviginti Athenaea Catholica, fel. mem. Pio PP. XI, Decessore Nostro, probante amplissime ac benedicente, foedere sociarentur eo consilio ut eorundem Rectores una cum professoribus aliisque ab ipsis delegatis, sollemnes conventus per temporis intervalla agentes, ea pertractarent negotia quae ad praeclsum eorum finem communiter provehendum maxime utilia forent et accomodata.

Nunc vero, immanissimo confecto bello, inter ea quae ad pacem caritatemque inter homines conciliandam ac firmandam conferunt, perquam opportunum habendum est, si omnes totius orbis Catholicae studiorum Universitates in magnam foederationem conveniant.

Quibus omnibus mature perpensis, Venerabilis Frater Noster Iosephus Sanctae Romanae Ecclesiae Cardinalis Pizzardo, Albanen-

sis Episcopus ac Sacrae Congregationis de Seminariis studiorumque Universitatibus Praefectus, precibus Nos adiit ut memoratam Athenaeorum Catholicorum foederationem constituere dignaremur. Nos autem, qui nihil antiquius habemus quam ut bonis studiis uberiora addamus incrementa et doctrinae Catholicae latiore ubique pandamus viam, huiusmodi vota libenti animo censuimus excipienda.

Itaque praesentium Litterarum tenore perpetuumque in modum, ex certa scientia ac matura deliberatione Nostra atque de Apostolicae potestatis plenitudine, *Catholicarum studiorum Universitatum foederationem* erigimus et constituimus, quae complecti valeat Athenaea quae vel Sancta Sedes ipsa per orbem canonice erexit erigetve in posterum, vel tamquam ad normam Catholicae institutionis directa eique plane conformata aperte agnoverit, omnibus privilegiis, iuribus et officiis personas, ad quas pertinet, cumulantes simulque definientes ut ea ipsa foederatio statutis regatur quae a Sacra Congregatione Seminariis studiorumque Universitatibus praeposita, fuerint approbata. Contrariis quibuslibet minime obstantibus.

Haec edicimus, statuimus ac declaramus, decernentes praesentes Litteras firmas, validas atque efficaces iugiter exstare ac permanere; illisque ad quos spectant, sive spectare poterunt, nunc et in posterum plenissime suffragari: sicque rite iudicandum esse ac definendum; irritumque ex nunc et inane fieri, si quidquam, secus, super his, a quovis, auctoritate qualibet, scienter sive ignoranter, contigerit attentari.

Datum Romae, apud Sanctum Petrum, sub anulo Piscatoris, die xxvii mensis Iulii, anno MCMXLIX, Pontificatus Nostri undecimo.

De speciali mandato Sanctissimi

Pro Domino Cardinali a publicis Ecclesiae negotiis

GILDO BRUGNOLA

*Officium Regens*

*Pontificiis diplomatibus expediendis*

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## SACRA PAENITENTIARIA APOSTOLICA

(Officium de Indulgentiis)

DECRETUM<sup>1</sup>DE PRECIBUS ET PIIS OPERIBUS INDULGENTIIS DITATIS,  
NOVA COLLECTIONE EDITIS

Quoniam volumen, quod "Preces et Pia Opera . . ." inscribitur atque anno MDCCCCXXXVII editum fuit, iam amplius non prostat, haec Sacra Paenitentiaria Apostolica illud iterum typis imprimere statuit, eo vel magis quod christifideles non pauci itemque Sacerdotes et Episcopi id ipsum multis ex partibus petierunt. Antequam tamen hoc propositum ad effectum deduceretur, opportunum visum est rem omnem diligenter recognoscere ac nonnulla expungere, quae minus apta viderentur, nonnulla vero adjicere, quae postremis hisce temporibus fuere indulgentiis insignita.

Normae autem, quibus hoc enchiridion compositum est et in praesentem formam redactum, eadem sunt, idemque propositum; ut nempe authenticum habeatur opus, quod Pontificias omnes hac in re largitiones in unum volumen colligat, quod quidem communi pietati modo tuto respondeat.

Quapropter hoc volumen preces complectitur ac pia opera, quae usque ad praesentem diem a Summis Pontificibus fuere indulgentiis ditata, quae adhuc vigent; tum ea videlicet, quae in favorem omnium christifidelium, tum ea etiam, quae in favorem quorundam coetuum personarum spiritualibus hisce muneribus insignita fuerunt, obrogatis ceteris omnibus generalibus indulgentiarum concessionibus, quae in hoc enchiridion non sint relatae.

Fore igitur sperandum est ut hoc opus uberes afferat spiritualis utilitatis fructus, utque ad sinceram ac solidam pietatem refovendam summopere conferat.

Ut autem omnino necessarium erat, res tota Augusti Pontificis Pii XII iudicio subiecta fuit, qui quidem in Audientia infra scripto Cardinali Paenitentiario Maiori die 29 mensis Decembris anni 1949 concessa, hanc precum piorumque operum Collectionem, typis Vaticanis impressam, approbavit; et obrogatis generalibus indulgentiarum concessionibus in eandem Collectionem non relatis, ipsam tantum ut authenticam haberi mandavit.

<sup>1</sup> AAS, XLII (1950), 404.

Contrariis quibuslibet non obstantibus, etiam specialissima mentione dignis.

Datum Romae, ex eadem Sacra Paenitentiaria Apostolica, die xxx Ianuarii MDCCCCL.

N. CARD. CANALI, *Paenitentiarius Maior*.  
L. ✠ S.

S. LUZIO, *Regens*.

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## DEFINITION OF THE DOGMA OF THE ASSUMPTION

By the Apostolic Constitution of November 1, *Munificentissimus Deus*, Pope Pius XII defined the dogma of the Assumption as pertaining to the deposit of Catholic doctrine. Present at the solemn ceremonies attending this momentous definition were the Latin Patriarchs, as well as the Patriarchs of the Armenian, Syrian, Coptic, Melkite and Chaldean Rites. A high Mass in honor of the Assumption was permitted on November 1, in virtue of a decree of the Sacred Congregation of Rites, in all churches, public oratories and semi-public oratories; in the Mass the collect of All Saints was used, according to the requirements of the decree, under one conclusion with the oration of the Assumption.

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## MIDNIGHT MASS ON FEAST OF THE IMMACULATE CONCEPTION

In an encyclical epistle, *Mirabile illud*, Pope Pius XII called for a crusade of prayer for peace. In the epistle he also informed the faithful that he would celebrate midnight Mass for this intention at the beginning of the Feast of the Immaculate Conception, asking them to join with him in their prayers. He also requested that in their novenas in preparation for the Feast of Christmas they give this intention a prominent place, including also prayers for the liberty of the Church and for the relief of the expatriated and the prisoners of war.

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## CHRISTMAS MESSAGE

In his Christmas message, Pope Pius XII warned the faithful against reliance upon organizational strength in the quest for peace and against the identification of selfish interests with the return of peace. Such a mistaken attitude, he said, is the chief threat to internal and to international peace which it sabotages through a destruction of the unity of purpose needed to achieve it.

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## SACERDOTAL SANCTITY

On September 23, Pope Pius XII issued an exhortation, *Menti Nostrae*, in which he insisted upon the essential place assigned priestly holiness in the solution of the problems arising from organized atheism and materialism.

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## NORMS FOR NUNS

On December 1 Pope Pius XII issued an Apostolic Constitution, *Sponsa Christi*, which in Part II lays down statutes, comprising nine articles, affecting the cloistered status of women religious of solemn vows. It permits the establishment of the so-called minor cloister which allows nuns to carry on within the convent such educational or social works as may be in keeping with their life in order that they may thus be able to obtain sufficient dependable income to meet the expenses of their livelihood and to fulfill the main purpose of their vocation. This relaxation is made necessary because of the fact that dowries prove inadequate to these demands, a consequence deriving principally from fluctuations in the value of money and of investments. The type of work allowed is exemplified in the instruction of pupils in religion. Nuns who previously were permitted to do this through a relaxation of their status which placed them in the category of those bound only by the episcopal cloister may now seek reinstatement. As a further step in strengthening the economic condition of the cloisters, the Constitution recommends federation, pointing particularly to its advantages in regard to the establishment of a common novitiate.

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## BIBLICAL STUDY IN SEMINARIES

An instruction of the Pontifical Biblical Commission was issued on May 13, 1950,<sup>1</sup> setting forth norms for the advancement of the standards of Scriptural study in seminaries and in the houses of study of religious. It incorporates by reference the provisions of the *motu proprio*, *Bibliorum scientiam*, of Pius XI, issued April 27, 1924,<sup>2</sup> and in the spirit of this document requires that professors of Sacred Scripture in seminaries shall have completed the special course of studies in that subject and shall have received a degree from either the Biblical Commission or the Biblical Institute. The present instruction emphasizes also the importance of continuing study. In connection with this phase of the professor's competence, it is insisted that he shall be familiar with the latest publications, shall attend meetings organized by his colleagues, and shall find an opportunity to pay a visit to the Holy Land. The whole time of the professor should be devoted to this one subject. It should be his lifework. He should be encouraged to make it such through adequate salary and other forms of remuneration, as well as through the financial contributions he needs to buy the required literature, to make trips to meetings, and to visit the Holy Land. Gifted students should find special courses available in auxiliary subjects. A good library is needed by all the students. The instruction further specifies fairly detailed teaching methods. It also insists that the junior clergy examinations shall contain questions dealing with Sacred Scripture and that this subject shall enjoy a prominent place among the subjects discussed at clerical conferences.

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## MIDNIGHT MASS ON NEW YEAR'S DAY

A decree of the Sacred Congregation of the Sacraments permitted Ordinaries to allow midnight Mass at the beginning of the Feast of the Circumcision in all cathedrals, collegiate, conventual and parochial churches, as well as in important oratories entrusted to religious if frequented by the public in great numbers. Only one solemn Mass was allowed. It was to be accompanied for two hours by prayers to the Blessed Virgin under the title of her Assumption

<sup>1</sup> AAS, XLII (1950), 495.

<sup>2</sup> AAS, XVI (1924), 180.

for the intention of the Pope. The time required for the celebration of the Mass was permitted to be computed within the two-hour period. The faithful who fasted from midnight were permitted to receive Holy Communion at the Mass.

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### FORBIDDEN BOOK

A decree of the Supreme Sacred Congregation of the Holy Office has placed on the Index of Forbidden Books a work by Joseph Klein entitled: *Grunlegung und Grenzen des kanonischen Rechts*.

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### HEROIC VIRTUE OF PIUS X

A decree of the Sacred Congregation of Rites has proclaimed the heroism of the practice of virtue on the part of Pius X.

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### BEATIFICATIONS

The following Servants of God have been beatified: October 1, Blessed Marie de Mattias; October 15, Blessed Anna Maria Javouhey; November 12, Blessed Marguerite Bourgeoys.

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### PATRONESS OF EMIGRANTS

Our Holy Father has named St. Frances Xavier Cabrini the patroness of emigrants.

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### DIOCESES DEDICATED TO THE IMMACULATE HEART

The Dioceses of La Crosse and St. Cloud have been dedicated to the Immaculate Heart of Mary.

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### PAPAL AUDIENCE FOR RULERS OF ITALY

More than one-half the entire membership of the Italian Parliament was received in a general audience by Pope Pius XII after their fulfillment of the conditions required for the gaining of the plenary indulgence attached to the Holy Year. They were ac-

accompanied by Premier Alcide de Gasperi, other Cabinet officials, and hundreds of government employees, inclusive of the police and the military.

In the course of the audience the Pope insisted that majority rule is a service and that to command is an act of obedience to the eternal laws of truth and justice. He exhorted his listeners to remember the first verse of Psalm CXXVI, a warning confirmed by universal experience: "Unless the Lord build the house, they labor in vain who build it. Unless the Lord guard the city, the guard watches in vain." He pointed to the power of legislation in its effect on the life or the death, the happiness or the discontent, the progress or the decay of the numberless human beings it is meant to control. He affirmed that good government is accomplished not by human power, not by any combination of superior intellect or knowledge or culture, but by the light of wisdom from above. He reminded his audience that virtue, probity, and integrity are needed in all they do for their country, to the utter contempt of all personal ambition. He prayed that Italy, with all its brother nations, might be preserved from war to realize in peace the earthly and the eternal ends of mankind.

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## SECULAR

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### THE ANTE-NUPTIAL AGREEMENTS IN IRELAND

On August 5, 1950, the Supreme Court of Ireland delivered reserved judgment dismissing the appeal of one Ernest Tilson from an Order of *habeas corpus* of the High Court directing him and the trustees of a children's home to produce his three children that they might be entrusted to their mother's custody.

Tilson is a member of the Church of Ireland [Anglican] and the mother is a Catholic. Before the marriage of the parents of the children, Tilson signed the usual ante-nuptial agreements. Two applications for a dispensation from the impediment of mixed religion had been refused prior to the signing of the agreement. After the second refusal Tilson applied for an interview with the parish priest. Interviewed by a delegate of the bishop, Tilson intimated

that he was taking instructions in the Catholic Faith. He gave complete assurance that he would do all in his power to safeguard the religion of the woman and he undertook to bring up in the Catholic Faith any children born of the union between them. The priest who interviewed him, convinced of his sincerity and believing that moral certainty existed as to the fulfillment of the undertaking, recommended the granting of the dispensation. Tilson in his affidavit replied to the affidavit made by the priest involved, but he denied only that he had intimated that he was taking instructions, insisting that no mention whatever was made of such instructions.

The four children of the marriage were baptized as Catholics. As they grew in years the children attended Mass with their mother and received their education at a Catholic school, the oldest of them making his first Holy Communion in May, 1949. Tilson said that he made objection at various times to this procedure, especially at the time when the oldest child made his first Holy Communion. Mrs. Tilson said that it was only at this time that Tilson began his objecting.

The married life of the parties was marked by unhappiness except for brief intervals. The husband appeared to be, if not intemperate, fond of drinking and not sufficiently aware of his responsibility to provide adequately for his family [according to the view of the court].

In December, 1949, he was summoned before a district justice and dismissed on his undertaking to pay a specified sum [£4] a week for the support of his family. The husband resorted to some ingenious device to remove the children from the dwelling in which they were residing with him and their mother and made representations that his wife had deserted the children. The court said that in fact the children had been well cared for and that they were living with the mother when Tilson took them away to get them supported at little or no expense. Mrs. Tilson worked in a laundry for £3 a week. Tilson was not satisfied with this, but without it the family would have been deprived of much which they had, up to the present, been enjoying. Unless compelled to do so, the court would be loath to allow children who were being brought up well at home to be delivered to a home for necessitous children.

The point of law was said by the court to be whether under the Constitution the agreement of Tilson and his wife to bring up their children as Catholics had in law a binding force.

It was said that in the law of England until 1882 a married woman, both as to property and in other respects, occupied, in law, a position of inferiority in regard to her husband. At common law the father had complete control over the children of the marriage and the wife had no voice against the wishes of her husband. This condition of the wife was improved by various Acts of Parliament. Women were also given a share in local government under the Local Government Act of 1898; subsequently they were given the right to vote in Parliamentary elections; Article 14 of the Constitution of 1922 recognized the equality of women and Article 16 of the same Constitution gave its important rights to all citizens without discrimination resulting from sex.

The court said that it was in the light of the foregoing facts that it came to the interpretation of the Constitution of Eire of 1937, but in virtue of Article 50 of this Constitution previously existing laws and principles are deprived of their force unless they derive efficacy from that Article.

Article 42 of the Constitution includes among the fundamental rights of citizens the inalienable right and duty of parents to provide according to their means for the religious, moral, intellectual, physical, and social education of their children, a joint right and duty inhering in both parents during their lifetime, possessed by the mother as well as by the father. It would, therefore, be resorting to an archaic norm to allow this right only to the father and such an archaic rule is not a proper guide in construing a new Constitution of a modern state.

The court referred to a ruling in the *Frost* case in which it had been held that prior to the Constitution of 1937, an ante-nuptial agreement made by a father to bring up his children in a particular religion was not binding in law, but the court had, in that case, recognized the right of the mother jointly with the father to make decisions regarding the religious education of their children.

If, then, they together make a joint decision and put it into practice, it was not in the power of either to revoke such a decision against the will of the other party. Such an agreement or such an exercise of the parents' power may be made before or after mar-

riage; if made before marriage dealing with matters that would arise only after and during the marriage and if put into effect after the marriage, it was equally effective and as binding in law as if made during the marriage as the occasion demanded or permitted.

Even under the former rule of English law it was accounted not an honorable proceeding for a husband to break a promise without which his wife would not have married him. But such a line of conduct was illegal even under the former rule, if the exercise of a power in making an agreement was the use of a joint power. Such an exercise of a joint power could not be revoked unilaterally.

Under the circumstances of the case, it was considered that Tilson had no justification on the grounds of the religious upbringing of his children or on any other grounds for taking the children from the family home. The children were to be returned to the mother to be educated by her, if not by the parents jointly, in the manner in which they had been taught pursuant to the ante-nuptial agreement.

The dissenting opinion held that Article 42 of the 1937 Constitution did not confer on the father and the mother alike the power which previously reposed in the father to direct the religious education of his children. That Article was regarded in the dissent as simply containing the State's guarantee of the inalienable right and duty of the parents to provide for the religious and moral education of their children, a right and duty that had previously existed before the Article was composed and adopted.

It seemed improbable, therefore, that this Article was intended to invest the mother with any different right in regard to her children's religion than she had previously possessed, namely, a right subordinate in the last resort to the father's overriding dictatorship as recognized by the common law. The dissenting opinion pointed to the *Frost* case as a clear recognition that the common law rule still prevailed after the adoption of the 1937 Constitution. Since, then, even under Article 42 of the Constitution the mother's right in regard to the religious and moral education of her children was subordinate to that of the father of the children, it could not be altered by an agreement between the parties any more than it could have been altered prior to the adoption of the 1937 Constitution.

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## INCOME TAX ON CHARITABLE BUSINESSES

Under an act of Congress federal income taxes will be demanded from church-affiliated educational and charitable institutions unless they are operated or principally supported by religious organizations, i.e., businesses owned by churches or by church associations will continue to be exempt but not those owned by associations merely affiliated with a church if the businesses are unrelated to the purposes of the institution which owns them. Institutions subject to the tax will be taxed at the regular corporation rates. Even if a church should own all the stock in a subsidiary corporation and even if all the profits should be devoted to religious purposes, the income (except rentals derived from real property) is taxable. Church-affiliated institutions (but not church-owned institutions) will be further required to make their financial data available to the public. The taxable status extends to church-affiliated institutions which have an unreasonably large accumulated income.

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## THEOLOGIAN'S BENEFITING FROM THE GI BILL

Though July 25, 1951, is the so-called "cut-off" date after which veterans cannot begin new courses of study under the GI Bill of Rights, seminarians may enter theology after that date without losing the benefits of the bill, since the course in theology will be considered as the normal fulfillment of a course of training begun by undergraduate students who have declared their intention of prosecuting a graduate course. It is an important requisite, however, that the respective seminarian, before graduation, shall declare his intention of studying theology; it is further required that he enter the theological course at the end of the summer vacation.

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## LIMITATIONS ON PROPERTY HOLDINGS IN ALASKA

The Interior Committee of the Senate has recommended the repeal of the law prohibiting religious or charitable holdings in excess of fifty thousand dollars as affecting Alaska. The Committee was of the mind that religious and charitable organizations should be encouraged to construct there additional hospitals, schools and recreational facilities.

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## THE SECULARIST MIDCENTURY WHITE HOUSE CONFERENCE

Six thousand delegates to the Midcentury White House Conference on Children and Youth were submerged in Washington by a tide of secularism, for the Conference resulted in: 1) a rejection of a provision that recommended the making of plans for the teaching of religion to all children in accordance with the wishes of their parents and the granting of credit for courses taught in accordance with those plans; 2) a rejection of a measure that advocated a released-time program for religious instruction in public schools; and 3) a rejection of a resolution that any federal aid for auxiliary welfare services in schools should be made available to all American school children regardless of the schools they attend.

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## STANDARDS OF THE MIDDLE STATES ASSOCIATION

The Middle States Association of Colleges and Secondary Schools reaffirmed in Philadelphia an assurance given at its Atlantic City Convention that Catholic schools will be permitted to qualify (i.e. modify) the criteria there established for the evaluation of schools so as to bring those criteria within the Catholic philosophy of education. The Association agreed that a statement on religion as an additional need in the curriculum will be prepared for submission to Catholic schools. In accordance with this policy, a resolution of the Association advocating sex education in high schools may be disregarded by Catholic schools.

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## BIBLE-READING IN NEW JERSEY SCHOOLS

The State Supreme Court of New Jersey has upheld the constitutionality of the State law requiring daily reading from the Bible and permitting the recitation of the Lord's Prayer in public schools.

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## SEPARATISTS ACTIVE IN MISSOURI

The Association of Free Public Schools has entered suit against all Missouri State officials who have any part in the distribution of State moneys to public schools, against all school boards or trustees

in four specific counties, and against the county fiscal officials, to prevent the payment of money for the use of Catholic property as school buildings or in return for the teaching services of Sisters wearing their religious garb while teaching in specified elementary and high schools attended by some two thousand pupils.

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### SAUCE FOR THE GOOSE BUT NOT FOR THE GANDER

The school board in Avon Lake, Ohio, has refused bus transportation to children attending the parochial school there, though the Avon Lake First Congregational Church is paid ninety dollars a month for space used as a kindergarten by the public school.

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### A HOUSE DIVIDED AGAINST ITSELF IN MASSILLON

The Mayor of Massillon, Ohio, has placed the facilities of the city's health department at the disposal of parochial schools after the board of education suddenly barred parochial school pupils from participation in the school health service. The Mayor said that the board had broken its word to him. The board opened its own health department during the summer after it had used the facilities of the city health department for years.

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### MONEY DOWN THE DRAIN

The free water and sewerage service given St. James Catholic School in Falls Church, Virginia, was discontinued on January 1.

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### NON-INSTRUCTIONAL PORTIONS OF SCHOOL BUILDINGS

The Attorney General of New York, in ruling on a question proposed by the New York State Youth Commission which is making contributions to match funds of local agencies, held that there is no violation of the State Constitution forbidding the use of State money for denominational education if the money is used for youth projects that involve no schooling and that are carried on in a non-instructional portion of even a school building that is owned by a religious body.

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## NOT ON THE SIDE OF THE ANGELS

In Los Angeles the taxes assessed against parochial school property are two to three times those assessed last year. This confiscatory rate is attributed in many quarters to the machinations of secret organizations seeking the total suppression of the parochial schools. The power to tax is truly the power to destroy.

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## SEGREGATION OF CHILDREN OF MEXICANS

A federal district court has declared a violation of civil rights to be involved in the segregation of children of Mexican descent in Arizona schools. Not all districts practice segregation; but an anti-segregation measure was defeated in the general election.

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## MISSISSIPPI GRANTS TO HOSPITALS

The Mississippi Supreme Court has ruled in a 4-2 decision that non-profit denominational hospitals are eligible for grants under the State's hospital construction program, thus deciding against a suggestion of error filed by the Attorney General's office in regard to the Court's earlier ruling that the State Auditor should honor a warrant in favor of the Mercy Hospital-Street Memorial at Vicksburg.

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## FLORIDA ZONING RESTRICTIONS

The Supreme Court of Florida has held that building restrictions imposed on business enterprises cannot be applied to churches and schools and thus decided that the Tampa authorities were not justified in refusing to issue a permit for the erection of a church on the ground that the plans did not provide adequate offstreet parking facilities as required by a city ordinance. After rendering its decision, the Court denied the city a rehearing.

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## TEST FOR OFFICE IN MASSACHUSETTS

The appointment by Governor Paul A. Dever of the Rt. Rev. Cornelius T. H. Sherlock, Superintendent of Schools of the Archdiocese of Boston, to the State Board of Education has been protested by the Massachusetts Council of Churches.

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## ANTI-COMMUNIST LAW IN NEW YORK

The Court of Appeals in Albany unanimously upheld the constitutionality of the Feinberg law barring members of subversive organizations from employment in the State's public schools.

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## RUTGERS INVESTIGATES ABORTION ARTICLE

*Antho*, undergraduate paper at Rutgers, published an offensive article dealing with the question of abortion. After a protest filed by several Catholic organizations, in which the administration was accused of negligence in permitting the publication of the article, the President appointed a five-man committee of investigation.

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## SPAIN AND THE UN

The United States has voted in favor of lifting the four-year diplomatic ban against Spain. By a vote of 38-10, with 12 abstentions, the General Assembly, over the protests of the Soviet bloc, withdrew, on November 4, the 1946 recommendation that all United Nations members should recall their ambassadors and ministers from Madrid. At the same time the way was opened to Spain to participation in the work of United Nations' specialized agencies, as the Food and Agriculture Organization and the World Health Organization, a participation that had also been blocked by the recommendation of 1946.

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INTER-AMERICAN SEMINAR'S POSITION ON  
TEACHER-TRAINING

The position of the Inter-American Seminar on Elementary Education held at Montevideo, Uruguay, has been modified as a result of Catholic protests. It no longer maintains that the training of

teachers in America is the exclusive task of government institutions but now acknowledges the right of private institutions to train teachers, provided they give a cultural and professional training the equivalent of that provided by government schools.

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### INTERNATIONAL UNION OF NON-PUBLIC SCHOOLS

At Avignon a congress sat January 5-7 composed of delegates from France, Great Britain, Belgium, Italy, Netherlands, and Lebanon, at which plans were laid for the convocation of a constitutional congress to establish an International Union of Free (Non-public) Schools.

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### CATHOLIC SECRETARIAT FOR EUROPEAN PROBLEMS

A meeting of Catholic leaders from eleven European countries was held in Strasbourg to form a Catholic Secretariat for European Problems. The purpose of the Secretariat is to represent the views of Catholics in the Council of Europe and to inform Catholic organizations of the Council's activities.

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### SCHOOL LICENSE OUTLAWED IN BRITISH COLUMBIA

The Supreme Court of British Columbia has overruled the conviction of Rev. John Bennett, C.S.S.R., as well as the fine of \$2.50 imposed on him. The conviction resulted from his refusal, as principal of the School of Our Lady of Perpetual Help, to pay a five-dollar license fee demanded of the church school by a municipal ordinance.

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### SEPARATISTS IN NEW BRUNSWICK

In St. John, New Brunswick, a concerted program by the Protestant Ministerial Association, activated just prior to the biennial civic elections, attacked a long-standing educational arrangement whereby the city had rented schools built by the Catholic diocese. As a result of this opposition only one of the five Catholics among

### PERSECUTION IN THE DODECANESE ISLANDS

Strenuous attempts are afoot in the Dodecanese Islands, which passed from Italy to Greece after World War II, to drive out Catholics. Priests and nuns are denied further residence permits, and this in opposition to the terms of the peace treaty. Nuns are forbidden to teach. The Catholic Cathedral has been turned into an Orthodox church and the archiepiscopal residence has been transferred to the Greek Orthodox Metropolitan. Most of the property of the Church has been confiscated and its charitable and educational institutions have been closed.

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### AUXILIARY SERVICES IN AUSTRALIA

In addition to enjoying with pupils attending government schools the privileges of bus, rail, and tram transportation, as well as scholarships, children in Catholic schools throughout Australia will be the beneficiaries of a nation-wide free milk distribution to children under the age of twelve, a program scheduled to commence operation in 1951.

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### SEPARATISTS IN SOUTH AFRICA

The Dutch Reformed Church called a Protestant Conference in Pretoria, South Africa, which was attended by unofficial delegates from the Anglican, Methodist, Presbyterian, and Baptist churches. It demanded a ban on the immigration of Catholics into South Africa and insisted on the cessation of provincial subsidies to Catholic schools.

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### MONEY FOR BLOOD IN YUGOSLAVIA

Two saving amendments have been attached to the bill appropriating \$38,000,000 for drought relief in Yugoslavia. They are the following: 1) it is provided that nothing in the act making the appropriation shall be interpreted as indorsing the measures undertaken by the present Yugoslav government which suppress or destroy religious, political, and economic liberty and that the Yugoslav government shall be so informed when aid is furnished; and 2) a duty is imposed on the Secretary of State of the United States

to make a full and detailed report to Congress on the operation of the Yugoslav aid program after each period of three months.

The first amendment noted above was imperative in view of the fact that since they began operations the communists in Yugoslavia have killed three hundred and seventy-eight priests and are now holding four hundred priests in prison besides Archbishop Stepinac and Bishop Cule of Mostar. The unjustified arrest of priests continues. Some priests have been murdered on public highways. All religious orders of women in Slovenia and in Bosnia Herzegovina have been dissolved. Hundreds of Sisters have been expelled from their convents and forced to go home to obtain ration cards. Many have been obliged to put off the religious garb and to take jobs in factories. Goons have broken into convents and beaten the Sisters. More than half the seminaries have been closed and their property confiscated. The remainder have been partially occupied by the communists. Every Catholic school, every Catholic hospital, every Catholic home for the aged has been confiscated. There is no Catholic press. The communist press attacks the Church with abusive articles against the Holy Father, against priests, and against Sisters. No residential bishop has been appointed since the communists usurped power.

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### POLISH EVASION

The Warsaw regime, in order to evade the fulfillment of the agreement which it made with the Hierarchy in April and which provided for religious instruction in Polish State schools, has turned over a thousand schools to an atheistic group called the Children's Friends, and thus has contradicted its own policy that only State schools can exist in Poland. Five hundred priest teachers have thus been dismissed.

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### ATTRITION IN CZECHOSLOVAKIA

Admitting their guilt under charges of treason, espionage, subversive propaganda, and assistance given persons fleeing the country, nine churchmen were given heavy sentences in Prague after the prosecutor made strenuous efforts to cast the responsibility for their guilt on Archbishop Josef Beran, seemingly desirous of laying the

groundwork for a subsequent sentence to be imposed on the Archbishop and on other members of the Hierarchy.

*L'Osservatore Romano* termed the proceedings the bitter expression of the hate of vengeful men arising from their impatience with the true patriotism and loyalty of the priests already imprisoned, from their fear of world opinion which has sided with the Archbishop, and from their resentment against the sentence of excommunication imposed on communists by the Vatican.

The charges could be substantiated only by attributing political significance to religious activity. Under such a construction, contacts with the Hierarchy were made to assume the character of conspiracy, the sending of information concerning the condition of the Church and the clergy and Catholic Action was given the appearance of espionage, the Archbishop was marked as the head of a spy center, and the Vatican was pictured as a hostile foreign State, even while it was defending only the spiritual liberties and the rights of the Catholic faith.

Referring to the testimony of the so-called expert in international law, Dr. Antonin Hobza, Professor at the University of Prague, who denied the validity of the norms of canon law in relation to the State, asserting that bishops automatically become traitors by telling priests how to act in regard to the law of Czechoslovakia, *L'Osservatore* noted how this made the State absolute, the master of all liberties, without regard to any juridical, religious or moral demands, responsible for its whims only to itself.

The law making the clergy civil servants, subject to political screening, is being used in Czechoslovakia to prevent newly ordained priests from taking up their duties. On the other hand, eight hundred communists have been enrolled in the government-controlled seminaries at Prague and Bratislava, where they are required to spend only two years in the study of theology before ordination. They are assured a salary of two hundred and twenty dollars a month (in contrast with the fifty dollars a month earned by the average worker) and the use of a personal automobile. Celibacy is optional.

Local communist bodies are making a complete inventory of church property in Czechoslovakia.

Practically all the Sisters in that country have been deported to concentration convents where they are closely watched, indoctri-

nated, promised brilliant futures if they cooperate, and further disagreeable treatment if they resist. Some proclaim conversion to communistic ideology but they are often communist agents in the garb of Sisters. In the concentration monasteries cruel treatment, including beatings, is given the monks. The latter are awakened in the middle of the night and forced to march in the rain singing communist songs glorifying Stalin. Elsewhere the monks are forced to work in the mines.

Most of the one hundred Greek Catholic priests in Czechoslovakia have been arrested in an attempt to force the fifty thousand members of the Greek Rite in that country to join the Orthodox Church.

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### SUPPRESSION OF RELIGIOUS IN HUNGARY

The Hungarian government has ordered the dissolution of all monastic communities except those engaged in operating church schools approved by the State. The religious have been given three months in which to leave their monasteries and convents.

Only eight schools have been approved by the State. Two high schools for boys will be entrusted to the Piarists; two high schools for boys, to the Benedictines; and two high schools for boys, to the Franciscans. Two high schools for girls will be given to the Poor School Sisters.

The theological faculty of the University of Budapest has been separated from the University. In its place, the Hierarchy has set up the Roman Catholic Central Theological Academy.

At the death of the vicar general who was incumbent at the time of the conviction of Cardinal Mindszenty, the government named his successor. It has since arrested and deported two priests canonically deputed to fill the post.

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### THE SCRAP OF PAPER IN ROMANIA

The Catholic bishops in Romania have refused to accept a draft agreement offered by the government to settle the relations between Church and State. In contrast with this loyal resistance, a group

of priests is said to have convened a congress to establish an autonomous Latin Rite church freed from ties with the Vatican.

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### FINAL TOUCHES IN BULGARIA

In Bulgaria, all statues and holy pictures have been removed from the schools. Priests are forbidden to enter the schools to teach religion. The few remaining priests are constantly subjected to a listening watch. Hospitals and schools have been deprived of the services of the Sisters who labored in them. Children are reprimanded in school for going to church.

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### RELIGION AS REQUISITE FOR DEGREE IN INDIA

By a resolution carrying out similar provisions in the Constitution of India, the Academic Council of the University of Madras has recommended that religious and moral instruction be held requisite for the obtaining of degrees in all colleges throughout India.

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### NOTRE DAME NATURAL LAW INSTITUTE

The fourth convocation of The Natural Law Institute took place in the Notre Dame Auditorium December 8 and 9, 1950. It was addressed by Thomas J. Brogan, former Chief Justice of the Supreme Court of New Jersey, Dr. Felix M. Morley, President of Human Events, Inc., and George E. Sokolsky.

## Book Reviews

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COMMENTARIUM IN CODICEM IURIS CANONICI. P. Heribertus Jone, O.F.M.Cap. Tomus Primus. Officina Libraria Ferdinandi Schönningh, Paderborn, 1950. Pp. 627. Preis 20 kart. geb. 24.

The author of this commentary is well known as a Moralist. His reputation is equally good as a Canonist.

This book is constructed very much along the lines of classroom lectures. The canons are examined in order following the method proposed by the Sacred Congregation of Seminaries and University Studies. The first volume of this commentary is restricted to the first and second books of the Code. Future volumes will be gratefully awaited.

Jone's work is well suited to studies in the Seminary. Especially is this so where a disposition to use Latin in Canon Law classes exists. There is ample exposition and sufficient discussion of controverted points of law. The author is for the most part willing to offer an opinion of his own or acknowledge adherence to one of several opinions. There is a notable lack to leave the student without something legally solid to hold.

In so far as the opinions of the author are concerned, it is to be expected that all his statements will not be accepted by contemporary Canonists. His opinion, for instance, that Orientals are bound by particular laws of public order may be mentioned as a statement which will not be acceptable to all Canonists. The same may be said relative to the author's interpretation of the term *aequivalenter* in canon 11. On the other hand, the author's views on customs beyond the law are readily acceptable.

Unfortunately neither an index nor a bibliography is provided with the first volume of this commentary. An examination, however, of the footnotes reveals the use of mostly Latin and German works. The standard commentaries in these languages are employed. Very few of other books in Canon Law are noticed. The articles cited are likewise mostly Latin and German. The avoid-

ance of books and articles in English will be a handicap for industrious English-speaking students who might desire to read further than this commentary indicates.

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DE ECCLESIAE INFALLIBILITATE IN CANONIZATIONE SANCTORUM. Quaestiones selectae. P. Franciscus Spedalieri, S.J. Officium Libri Catholici, Romae, 1949, Catholic Book Agency. Pp. 63.

In this short treatise on the infallibility of the Church, the author stresses the reason why the Church is infallible in the canonization of Saints. The reason advanced is the further determination of the Communion of Saints.

To support this contention, the author cites in detail both in text and in footnotes various documents and statements of canonization. Opposing views are analyzed.

Supplementary to the main thesis of his work, the author examines the historical accuracy of some documents which refer to the founders of Orders. The main documents are in reference to the founders of the Order of Servites. These documents are subjected to careful examination and their accuracy is critically weighed.

As an appendix the author offers several photostatic copies of early documents.

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DE CONIUGUM SEPARATIONE AC DE CIVILI DIVORTIO IN IURE CANONICO ET IN IURE CIVILI STATUUM FOEDERATORUM AMERICA SEPTENTRIONALIS. Sac. Vincentius J. Hines, J.C.D. Pontificium Institutum Utriusque Iuris. Theses ad Lauream, N. 62. Officium Libri Catholici, Romae, 1949, Catholic Book Agency. Pp. 184.

The subject of this book has been a dissertational topic in several Universities in the past few years. This work, like the rest, has been carefully constructed under the guidance of able professors.

The dissertation at hand is, for the most part, strictly canonical and has very little historical matter. The pertinent canons are examined and expounded in sufficient detail. To this is added a discussion on what tolerance may be considered relative to civil divorce.

Of particular interest and of considerable advantage is the author's lengthy discussion of divorce and separation in the United States. The ease with which divorce can be obtained here is pointed out with impressive weight. The matter which the author presents is truly alarming and should be disturbing.

The pastoral zeal of the author urges him to conclude his dissertation with a series of articles on the means and remedies to meet the evil of divorce and separation. Various means used in several dioceses are examined and their utility stressed. This part of the dissertation could well be the subject for frequent clerical conferences.

Specimens of petitions are offered for practical use. The bibliography is satisfactory and contains volumes in several languages in addition to a number of articles in legal reviews. Unfortunately, particularly in the latter part of this dissertation, there are a number of errors not all of which are typographical.

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#### THE JURIDICAL EFFECT OF THE DOUBTFUL CESSATION OF LAW ACCORDING TO THE CODE OF CANON LAW.

Alphonsus J. Thomas, C.S.S.R. *Les Thèses Canoniques de Laval.* Thèses No. 9. Faculté de Droit Canonique, Université Laval, Quebec, 1949. St. Alphonsus Seminary, Woodstock, Ontario. Pp. xviii-110. Price \$1.50.

This is a dissertation presented to the Faculty of Canon Law of the Laval University for the degree of Doctor of Canon Law.

The general impression of this dissertation is one of satisfaction. The author has made a rather complete study of his subject. His method is painstaking and gives evidence of real industry.

Nevertheless, the particular impression of the reviewer is that this is another attempt to compare Aequiprobabilism with Probabilism. Controversies here are old enough and are not likely to be resolved by this dissertation. Aequiprobabilists will continue on their way as will Probabilists.

It is submitted that on one point, at least, the author is not completely consistent. In one part of his work, he practically admits that permanence is not of the essence of law but in another part, he insists that without such permanence injury to the community

is real. This is advanced as an important reason why a law in doubt as to its cessation must continue to oblige.

Nor can the canons offered to assist in the interpretation of canon 15 be entirely admitted. Canon 6, 4°, and canon 23 refer to prescripts of individual laws, not primarily to principles of law. In the sense of prescripts of law, these canons correctly assert the stability of ecclesiastical discipline. They are not, however, immediately useful in the fundamental notion of doubtfully existing laws.

According to the author, canon 15 requires interpretation by means of the above mentioned canons. This is scarcely a debatable point since the canon makes no distinction whatever in the manner in which a doubtful law arises. It ought to be admitted that those who codified the law well knew of the dispute between Aequiprobabilists and Probabilists precisely in the doubtful cessation of law. If the former were favored a mere and simple clause would have indicated this.

One of the Rules of Law (Rule 65) is suggested by the author as a means of interpreting canon 15. This Rule reads: *In pari delicto et causa potior est conditio possidentis*. The author properly does not attempt to apply this Rule directly but he asserts that its fundamental concept can be actually used. What is overlooked, however, even in the common opinion stated by the author is that this Rule is merely adapted, not actually extended to the interpretation of laws. Valid extension of this Rule from matters of justice to legal interpretation is scarcely admissible since no real common ground is found for its extension. It is of no actual consequence to say that this Rule is based on the natural law. No one denies this. What is challenged is the propriety of using extension rather than adaptation when the legal basis of the Rule is altered.

The index is short. The bibliography, however, is extensive and includes the pertinent works in Canon Law and Moral Theology. The author and his University are to be commended for this serious study.

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DE POTESTATE MAGISTRI SPIRITUS AD NORMAM  
CANONIS 588. Vigilius Alt, O.F.M.Cap. Officium Libri Catholici,  
Romae, 1949, Catholic Book Agency. Pp. viii-165.

The power of the Spiritual Director is the subject of this book. Before he attempts to comment on the text of canon 588, the author carefully considers the papal Constitutions relative to the life of religious and particularly to the existence and work of the Spiritual Director. The Constitutions of Popes Benedict XII and Clement VIII are examined.

Canon 588 is considered in the light of canons 18 and 20. Both these latter canons are dissected and each part is used to comment on canon 588. In addition, the author examines the rules of many religious communities to see whether any particular mention is made of the work of the Spiritual Director. Many of the later communities give ample detail in this matter.

The author's conclusion is that the Spiritual Director can be considered a religious Superior. His power is not legislative in any sense but remains dominative. It is, however, a greater concession of power than is credited to the Master of Novices. This follows from the fact that the subjects of the Spiritual Director are actually religious in a house of studies whereas the subjects of the Master of Novices are not actually religious.

This study of canon 588 is a welcome addition to the commentary on the law of religious.

The bibliography is short and not entirely satisfactory. Most of the bibliography is given by the authors' name only. Complete information must be sought in the footnotes. There is no general index but an index of apposite canons is provided.

EDWARD ROELKER

THE CATHOLIC UNIVERSITY OF AMERICA

# Chronicle

## GENERAL

At the November meeting of the Administrative Board of the National Catholic Welfare Conference, the following members of the Hierarchy were elected to serve the Conference for a year. Chairman of the Board: Most Rev. Francis P. Keough, D.D., Archbishop of Baltimore. Vice Chairman of the Board and Treasurer: Most Rev. Karl J. Alter, D.D., LL.D., Archbishop of Cincinnati. Secretary: Most Rev. John F. Noll, D.D., Bishop of Fort Wayne. Chairman of the Board of Lay Organizations: Most Rev. Robert E. Lucey, D.D., S.T.D., Archbishop of San Antonio. Chairman of the Youth Department: Most Rev. John J. Mitty, D.D., Archbishop of San Francisco. Chairman of the Department of Social Action: Most Rev. Patrick O'Boyle, D.D., Archbishop of Washington. Chairman of the Department of Catholic Action Study: Most Rev. Joseph E. Ritter, S.T.D., Archbishop of St. Louis. Chairman of the Department of Education: Most Rev. Matthew F. Brady, D.D., Bishop of Manchester. Chairman of the Press Department: Most Rev. Michael J. Ready, D.D., Bishop of Columbus. Chairman of the Legal Department: Most Rev. Emmet M. Walsh, D.D., Coadjutor Bishop of Youngstown. The following were asked to serve as Assistant Chairmen: Assistant Chairman of the Board: Most Rev. Lawrence J. Shehan, D.D., Auxiliary of Baltimore; Assistant Secretary: Most Rev. Vincent S. Waters, D.D., Bishop of Raleigh; Department of Education: Most Rev. Russell J. McVinney, D.D., Bishop of Providence; Legal Department: Most Rev. Bryan J. McEntegart, D.D., LL.D., Bishop of Ogdensburg; Press Department: Most Rev. Thomas J. Gorman, D.D., D.Sc.Hist., Bishop of Reno; Department of Lay Organizations: Most Rev. Allen J. Babcock, D.D., Auxiliary of Detroit; Youth Department: Most Rev. Richard O. Gerow, D.D., Bishop of Natchez; Department of Catholic Action Study: Most Rev. William A. Scully, D.D., Coadjutor Bishop of Albany; Assistant for the Department of Social Action: Most Rev. John F. O'Hara, C.S.C., D.D., Bishop of Buffalo; Department of Social Action (for hospitals): Most Rev. William A. O'Connor, D.D., Bishop of Springfield, Ill.; (for charities): Most Rev. Charles Hubert LeBlond, D.D., Bishop of St. Joseph, Mo.; (adviser for rural life work): Most Rev. Albert R. Zuroweste, Bishop of Belleville; (adviser for family life work): Most Rev. Peter W. Bartholome, D.D., Coadjutor of St. Cloud.

Rt. Rev. Howard J. Carroll, D.D., was re-elected General Secretary and Very Rev. Msgr. Paul F. Tanner, Assistant General Secretary.

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His Eminence, Clemente Cardinal Micara, has been appointed Prefect of the Sacred Congregation of Religious; he is also serving as Prefect (*ad interim*) of the Sacred Congregation of Rites.

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On October 16, His Eminence, Eugene Cardinal Tisserant, celebrated a Pontifical Mass of Thanksgiving in observance of the centenary of the establishment of the Diocese of Savannah-Atlanta. The sermon was preached by Most Rev. Emmet M. Walsh, D.D., Coadjutor of Youngstown.

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Most Rev. Sergio Pignedoli has been named Apostolic Nuncio to Bolivia, succeeding Most Rev. Joseph Burzio, who goes to Cuba as Apostolic Nuncio.

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Monsignor Silvio Oddi, of the Vatican Secretariat of State, has been sent to Yugoslavia as *chargé d'affaires* of the Papal Nunciature in Belgrade in the absence of the Regent, Archbishop Joseph P. Hurley.

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Most Rev. Arcadius Larraona, C.M.F., has been named Secretary of the Sacred Congregation of Religious.

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The Most Reverend Apostolic Delegate to the United States celebrated the forty-first Pontifical Pan-American Mass on Thanksgiving Day in St. Patrick's Church, Washington, D. C.

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The Most Reverend Apostolic Delegate to the United States celebrated a Pontifical Mass to open the four-day Franciscan Marian Congress held in Washington, D. C. The sermon was preached by Most Rev. Patrick A. O'Boyle, D.D., Archbishop of Washington.

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On October 11, the Most Reverend Apostolic Delegate to the United States celebrated a Pontifical Mass in St. Louis Cathedral, New Orleans, in observance of the centenary of the establishment of the Archdiocese.

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On September 15, the Most Reverend Apostolic Delegate to the United States celebrated a Pontifical Mass of Thanksgiving in St. James Cathedral, Seattle, in observance of the centenary of the establishment of the Diocese. The sermon was preached by Most Rev. Duane G. Hunt, D.D., Bishop of Salt Lake City.

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On October 22, solemn Masses of Thanksgiving were offered in all the churches of the Archdiocese of New York in commemoration of the centenary of the establishment of the Archdiocese. On October 25, a synod was convoked in St. Patrick's Cathedral, New York City. On October 27, a Pontifical Mass was celebrated in the Cathedral for all the bishops, the clergy, and the laity of past generations of the Archdiocese. On October 29, a Pontifical Mass was celebrated in the Cathedral in thanksgiving for the blessings bestowed on the Archdiocese.

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October 17-19, the Archdiocese of St. Paul celebrated the centenary of its establishment with three Pontifical Masses celebrated on the respective days

by Most Rev. Thomas A. Welch, D.D., Bishop of Duluth, Most Rev. James J. Byrne, D.D., Auxiliary of St. Paul, and Most Rev. John Gregory Murray, D.D., Archbishop of St. Paul. The sermon at the Mass on October 19 was preached by Most Rev. James L. Connolly, D. D., Coadjutor of Fall River.

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On July 19, the Archdiocese of Cincinnati celebrated the centenary of its establishment as an Archdiocese.

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October 26, Most Rev. Francis P. McKeough, D.D., Archbishop of Baltimore, sang a Pontifical Mass in St. Joseph's Cathedral, Wheeling, in observance of the centenary of the establishment of the Diocese. The sermon was preached by Most Rev. Peter L. Ireton, D.D., Bishop of Richmond. On October 22, special Masses of Thanksgiving were celebrated in all the churches of the Diocese. On October 25, Most Rev. John J. Swint, D.D., Bishop of Wheeling, celebrated a Pontifical Mass in the Cathedral in observance of Children's Day.

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On December 6, Most Rev. Edwin V. Byrne, D.D., Archbishop of Santa Fe, celebrated in St. Francis Cathedral the silver jubilee of his consecration.

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On November 30, Most Rev. Edmond J. FitzMaurice, D.D., Bishop of Wilmington, observed the silver jubilee of his consecration.

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On December 5, the third synod of the Diocese of Marquette was convoked.

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His Eminence, Francis Cardinal Spellman, blessed and dedicated the new national headquarters of the Xavier Society for the Blind in New York City on the occasion of the observance of the golden jubilee of its establishment.

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December 15-17, there was held in Rome a meeting of the International Federation of the Men of Catholic Action.

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December 3-10, forty American universities were invited to participate in an International Universities Conference held on the aforesaid dates at Nice, France.

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December 27-29, the American Catholic Sociological Society met in Chicago. It was addressed on December 28 by His Eminence, Samuel Cardinal Stritch.

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The sermon at the "Red" Mass sponsored by the Catholic Lawyers' Guild and celebrated in St. Andrew's Church, New York City, was preached by Most Rev. John F. O'Hara, C.S.C., D.D., Bishop of Buffalo.

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November 2-6, the National Conference of Catholic Charities held its annual meeting in Washington, D. C. Accompanying it were the annual meetings of the Society of St. Vincent de Paul and of the Apostleship of the Sea.

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October 14, Most Rev. Edward F. Hoban, D.D., Bishop of Cleveland, celebrated a Pontifical Mass opening the four-day twenty-fifth annual convention of the National Conference of Catholic Women held in Cleveland. At the convention it was reported that there are 6473 affiliates in 111 dioceses, representing six million Catholic women.

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October 15, the twenty-eighth national convention of the National Catholic Rural Life Conference was held in Belleville. Its distinguished service award was given to Most Rev. Joseph H. Schlarmann, D.D., Bishop of Peoria. The presentation of the award was made by Most Rev. John P. Treacy, D.D., Bishop of La Crosse, President of the Conference.

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December 3, 4, the sixth annual Catholic Conference on Industrial Problems was held in Portland, Oregon.

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December 27, the ninth annual meeting of the Catholic Economic Association was held in Chicago.

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October 6-8, the eighth biennial congress of the National Laywomen's Retreat Movement was held in Detroit.

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The Catholic Art Association held its convention at Fontbonne College, St. Louis.

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October 15, the Sisters of St. Joseph observed the tercentenary of the founding of their institute.

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September 27-29, the Sisters of Charity observed the centenary of their affiliation with the Daughters of Charity. Pontifical Masses were celebrated on the respective days by the Most Rev. Apostolic Delegate to the United States, by Most Rev. Patrick A. O'Boyle, D.D., Archbishop of Washington, and by Most Rev. Richard J. Cushing, D.D., Archbishop of Boston.

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September 30, the Medical Mission Sisters observed the silver jubilee of the founding of their institute.

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November 7-9, the third annual conference of the National Catholic Cemetery Conference was held in Buffalo.

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His Eminence, Bernard Cardinal Griffin, was Papal Legate at the observance of the centenary of the restoration of the Hierarchy in England. Pope Pius XII marked the occasion with a letter to the Cardinal and with a radio message to the people. His Eminence, Francis Cardinal Spellman, preached to two thousand nuns assembled in Westminster Cathedral at the solemn Mass through which they participated in the observance.

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October 6, the Province of Quebec was dedicated to the Immaculate Heart of Mary. Most Rev. Maurice Roy, D.D., Archbishop of Quebec, celebrated a Pontifical Mass on the occasion of the reading of the act of consecration by the provincial treasurer delegated by the premier to do so. The sermon on the occasion was preached by Most Rev. Charles Grant, D.D., Auxiliary of Quebec.

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October 4, Most Rev. Thomas A. Emmet, S.J., retired Vicar Apostolic of Jamaica, died at the age of 78.

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December 13, Most Rev. George J. Donnelly, D.D., Bishop of Kansas City, died. The Pontifical Requiem Mass attending his funeral was celebrated in St. Peter the Apostle Cathedral, Kansas City, by Most Rev. Joseph E. Ritter, S.T.D., Archbishop of St. Louis.

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December 21, His Eminence, Konrad Cardinal von Preysing, Bishop of Berlin, died at the age of 70.

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December 22, Most Rev. Hugh C. Boyle, D.D., Bishop of Pittsburgh, died at the age of 77. He was buried December 28 after a Pontifical Requiem Mass celebrated in St. Paul's Cathedral, Pittsburgh, by His Eminence, Edward Cardinal Mooney, Archbishop of Detroit.

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#### DIGNITIES

The personal title of Archbishop has been granted Most Rev. Aloisius J. Muench, D.D., Bishop of Fargo and Regent of the Apostolic Nunciature in Germany.

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The Most Reverend Apostolic Delegate to the United States consecrated Most Rev. Leonard Paul Hagarty, O.S.B., D.D., Titular Bishop of Arba and second Vicar Apostolic of the Bahamas. The ceremony took place in the Church of Our Lady of the Holy Souls, Nassau. The co-consecrators were Most Rev. Peter W. Bartholome, D.D., Coadjutor of St. Cloud, and Most Rev. Stephen Donahue, D.D., Auxiliary of New York. The sermon was preached by Most Rev. Henry P. Rohlman, D.D., Archbishop of Dubuque.

Most Rev. Maurice Schexnayder, D.D., has been appointed Titular Bishop of Tuccamia and Auxiliary of Lafayette, Louisiana.

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Most Rev. Edward D. Howard, D.D., Archbishop of Portland, blessed Rt. Rev. Damian Jentges, O.S.B., D.D., Coadjutor Abbot of Mt. Angel Abbey. The sermon was preached by Most Rev. Francis P. Leipzig, D.D., Bishop of Baker City.

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Most Rev. Henry P. Rohlman, D.D., Archbishop of Dubuque, has been named Assistant at the Pontifical Throne.

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Most Rev. Edmond J. FitzMaurice, D.D., Bishop of Wilmington, has been named Assistant at the Pontifical Throne.

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Most Rev. Joseph H. Schlarman, D.D., Bishop of Peoria, has been named Assistant at the Pontifical Throne.

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The Most Reverend Apostolic Delegate to the United States has accepted an honorary doctorate from Xavier University, New Orleans, on the occasion of the celebration of the institution's silver jubilee.

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Rt. Rev. Msgr. Fulton J. Sheen, Ph.D., LL.D., D.D., L.H.D., Litt.D., has been appointed National Director of the Pontifical Mission Aid Societies in the United States, succeeding Most Rev. Thomas J. McDonnell, D.D., Auxiliary of New York.

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Rt. Rev. Msgr. Patrick J. O'Connor has been named Director of the National Shrine of the Immaculate Conception.

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Very Rev. John Sephton, C.S.S.R., has been named Provincial of the Eastern Province of the Redemptorists.

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Very Rev. James Vance, C.S.S.R., has been named Provincial of the St. Louis Province of the Redemptorists.

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Very Rev. Julius Rizze, F.S.C.J., has been named Provincial of the newly established Province of the Sons of the Sacred Heart in the United States.

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The following have been named Protonotaries Apostolic: Rt. Rev. Msgrs. Edward V. Dargin, Aloysius C. Dineen, George C. Ehrhardt, John M. Fearn, Philip J. Furlong, Edward R. Gaffney, Joseph A. McCaffrey, Joseph A. Nelson, John J. O'Donnell, Arthur J. Scanlan, Thaddeus W. Tierney, and Francis W.

Walsh, of the Archdiocese of New York; Francis L. Phelan, of the Archdiocese of Boston; and Joseph E. Moylan, of the Diocese of Savannah-Atlanta.

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The following have been named Domestic Prelates: Rt. Rev. Msgrs. Felix F. Burant, Ignatius Cirelli, James P. Kelly, Edward A. Loehr, Richard Pigott, Arthur J. F. Quinn, Bernard J. Rourke, Patrick J. Temple, Michael A. Walsh, and George J. Zentgraf, of the Archdiocese of New York; William J. Daly, Michael E. Doherty, Daniel J. Donovan, Walter J. Leach, Charles D. McInnis, and Thomas J. Riley, of the Archdiocese of Boston; Thomas V. Cassidy, J. Adrien Forest, Joseph P. Gibbons, J. M. Leon Giroux, Peter A. Hanley, Edward A. Higney, Cornelius J. Holland, Bernard J. Lennon, Charles J. Mahoney, Thomas J. McKitchen, Antonio P. Rebello, Camille Villard, and Henry Vincent, of the Diocese of Providence; John C. Kirk and Patrick J. O'Connor, of the Diocese of Savannah-Atlanta; Thomas J. Coleman, Louis G. Fay, and Anthony Goebel, of the Diocese of Covington; and Francis J. Green, of the Diocese of Tucson.

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The following have been named Papal Chamberlains: Very Rev. Msgrs. Aloysius F. Coogan and John M. Costello, of the Archdiocese of New York; Ralph J. Gallagher, Arthur V. Lyons, John J. Murray, Henry J. O'Connell, Joseph A. Robinson, Robert I. Sennott, and Matthew P. Stapleton, of the Archdiocese of Boston; J. Nicholas Allgeier, Anthony Badina, Thomas E. Dillon, Julian F. Doktor, Ignatius Gapeczynski, Charles F. Girardot, Francis X. Guerra, and Michael Shea, of the Diocese of Fort Wayne; Joseph A. Lubrecht and Oscar L. Poole, of the Diocese of Covington; and William F. Murray, of the Diocese of Providence.

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The following have been made Commanders of the Order of St. Gregory the Great: Maj. Gen. Thomas F. Hickey, Chief of Staff of the United States Forces in Austria; and Albert J. Grosser, of the Diocese of Covington.

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The following have been named Knights of the Order of St. Gregory the Great: Romy J. Hammes and John Michael Joyce, of the Diocese of Joliet; Hugh Grady, James P. Houlihan, and Hugh Kinchley, of the Diocese of Savannah-Atlanta; and Alex J. Brunini, Edmund L. Brunini, and Judge James H. Keyes, of the Diocese of Natchez.

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The Grand Cross of the Order of St. Sylvester was conferred on John F. Cuneo, of Chicago.

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Edward J. Kirchner, an official of the International Refugee Organization in the American Zone of Germany, has been named a Knight of the Order of St. Sylvester.

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The medal *Pro Ecclesia et Pontifice* has been awarded to: Rev. Flaminio Parenti, P.S.S.C., of the Diocese of Providence; Mrs. Sylvester Roth and Mrs. Ignatius Spenner, of the Archdiocese of Omaha; Mrs. P. H. Rice, of the Diocese of Savannah-Atlanta; and Mrs. Dorothy Hofweber Hammes, of the Diocese of Joliet.

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Dr. Paul Francis Kotaro Tanaka, Chief Justice of the Supreme Court of Japan, received an honorary LL.D. from Fordham.

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Chaplain (Commander) Joseph F. Mannion, of the Diocese of Pittsburgh, has been named Assistant Director of the Office of Navy Chaplains.

\* \* \* \* \*

Brigadier Gen. Carlos Romulo received the Cardinal Gibbons medal from the Alumni Association of The Catholic University of America.

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Attorney General J. Howard McGrath and Lou Montgomery, President of the Catholic Interracial Council of Hartford, were given the James J. Hoey Awards for Interracial Justice on the Feast of Christ the King by the Catholic Interracial Council of New York.

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Aloysius Fitzpatrick, of Philadelphia, received the 1950 St. Vincent de Paul Medal from St. John's University, Brooklyn, for leadership in social service.

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Gabriela Mistral, Chilean poetess, received the 1950 Americas Award given by the Academy of American Franciscan History.

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Mother Marie Antoinette, Superioress General of the Daughters of Charity of St. Vincent de Paul, received the Frederick Ozanam Medal from The Catholic University of America at the thirty-sixth National Conference of Catholic Charities held in Washington.

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## THE CANON LAW SOCIETY OF AMERICA

### MIDWEST REGIONAL MEETING

On September 13-14, 1950, there was held a two-day regional meeting of The Canon Law Society at the Morton House in Grand Rapids, Michigan. After the opening luncheon, the afternoon meeting convened at 3:00 o'clock. At this meeting the Rev. Thomas Owen Martin, S.T.D., J.C.D., of The Catholic University of America, presented a paper on the evaluation of hearsay evidence in court procedure. This paper, which appears in this and the next issue of *THE JURIST*, gave rise to an extended discussion from the floor of the assembly.

After the evening dinner, a meeting at 8:00 o'clock invited open and public discussion regarding the project of standardized formularies made available for curial use. The Rev. John Quinn, J.C.D., of Chicago, led the discussion. After many exchanges of divergent views in this matter, it was decided that Father Quinn, as chairman of a committee, should work out a report to be given at the next regional meeting.

In the morning meeting on the second day the Rt. Rev. Chester A. Ropella, J.C.D., Chancellor of the Diocese of Green Bay, offered a paper on the question of a baptism's validity when conferred with the requisite matter and form in certain Christian sects. The response of the Holy Office, as given on December 28, 1949 (AAS, [1949], 650), served as the basis for this discussion. It is hoped that this paper, too, may appear in some later issue of *THE JURIST*.

In a business session connected with this final meeting, the Very Rev. Benjamin F. Farrell, J.C.D., *Officialis* of the Diocese of Wheeling, and Secretary-Treasurer of the Midwest Conference, reported the current assets as approximately \$600.00, which sum resulted, after the payment of all incidental bills and expenses, from what could be saved from the paid registrations at past meetings. Provision was made for a committee to draw up by-laws and regulations for the regional conference and to present these for adoption at the next regional meeting. The invitation which the Rt. Rev. Edward M. Kinney, Chancellor of the Diocese of Madison, extended for the holding of the next meeting at Madison during Easter-Week of the year 1951 was unanimously adopted by the assembly. The luncheon which followed brought the meeting to its close.

#### ANNUAL NATIONAL MEETING

On October 11-12, 1950, The Canon Law Society of America convened for its twelfth annual meeting, held at the Waldorf-Astoria Hotel in New York City.

#### AFTERNOON MEETING

At the opening session, held at 3:30 P.M., the Rt. Rev. James P. Kelly, J.C.D., as President of the Society, welcomed the attending members, about 125 in number. He introduced the Very Rev. John J. Król, J.C.D., Vice-Chancellor of the Diocese of Cleveland, for the presentation of a paper dealing with the limited applicable arrangement of the brother-sister relationship in the case of invalidly married couples. The speaker felt that any approval for such an arrangement was normally to be sought and obtained from the local Ordinary as a matter pertaining to the external forum. He pointed out this method of procedure as the one that was in use in the Diocese of Cleveland. The very detailed but closely articulated presentation of the paper gave rise to a discussion which itself offered much by way of added information and caution. The paper itself is reprinted in this number of *THE JURIST*.

#### BUSINESS MEETING

After the President of the Society reported regarding the Society's general activity through its holding of regional meetings, he called on the various

committees for their report. The Rt. Rev. Louis Wolf, *Officialis* of the Diocese of Cleveland, and chairman of the Committee on Research and Discussion, pointed out that this committee had made ready for distribution mimeographed copies of the grants of various faculties to various dioceses throughout the country. It welcomed from anyone whatever additional information of this kind could be furnished.

The Very Rev. Alfred R. Julien, J.C.D., of Boston, submitted the report of the Committee on Promoting Regional Conferences. He indicated that in the interest of greater convenience of attendance at meetings the Committee suggested that the various conferences could well abstract from conformity with the lines and boundaries of the various ecclesiastical provinces. It was the Committee's policy to stimulate the formation of additional regional conferences through action taken by the Society's membership in such regions rather than by way of organization superimposed by the Committee itself. It may be added here that since the time of the making of this report there has in fact been organized the San Francisco-Los Angeles Conference, which held its opening meeting on October 17-18, 1950.

The report of the Committee on Membership was submitted by the Rev. Clement Bastnagel, J.U.D. During the past summer about a thousand circulars had been sent out for the purpose of enlisting new and re-enlisting old members. As many as 28 of the hierarchy had subscribed for the 1950 list of Canon Law dissertations in whole or in part. In addition 330 membership payments were made: from the U.S.A. and Possessions, 305; from Canada, 21; from Italy, 3; from Belgium, 1. It was felt that by the end of this calendar year the number of members might stand at 400 or even more. Subsequent to some discussion it became understood that membership should be available exclusively for physical persons, so that seminary and chancery libraries would have to designate some individual as the bearer of membership rights in their favor.

#### REPORT OF THE TREASURER

The Society's annual financial report was submitted by the Rev. Clement Bastnagel, Treasurer of the Society. The report covered the period from December 14, 1949, to September 30, 1950, which latter date now marks the close of the Society's fiscal year. Total income through payment of dues and subscriptions had been \$4,351.10. Total expenditures for the acquiring of 13 dissertations (approximately 3,600 copies) and the distribution of 12 dissertations (approximately 2,950 copies) had been \$3,586.78. The resulting net gain of \$764.32 was augmented by means of accrued interest (\$270.12) to reach the sum of \$1,034.44.

On December 14, 1949, the Society's assets had been \$10,824.11. The sum of \$1,034.44 added thereto gave the Society \$11,858.55 in assets as of October 1, 1950.

The Society looked forward to the publication of 39 dissertations and the acquisition of about 10,950 copies of these for distribution among the membership. These dissertations, identifiable through the serial number they bear in The Catholic University of America Canon Law Studies Series, are the

following, Nos. 189, 201, 203, 207, 230, 233, 244, 245, 246, 267, 271, 277, 279, 281, 282, 285, 289, 296, 298, 299, 303, 304, 305, as also 306-321, which latter group represents the 1950 list of Canon Law dissertations approved for printing.

As in 1947, 1948 and 1949, so the Society again, on the Treasurer's recommendation, set aside a sum of \$300.00 for the purchase of books for the Canon Law Library of The Catholic University of America. The sum of \$799.75 has up to date been expended; thus a sum of \$400.25 is on hand for future use.

#### ELECTION OF OFFICERS

The business next in order was the election of the new officers for the ensuing year. The results were: for President, the Rt. Rev. Edward M. Burke, J.C.D., of Chicago; for Vice-President, the Rev. Sylvester F. Gass, J.C.D., of Milwaukee; for General Secretary-Treasurer, the Rev. Clement Bastnagel, J.U.D., of The Catholic University of America; for Recording Secretary, the Rev. Charles A. Kerin, S.S., J.C.D., of St. John's Seminary, Plymouth, Michigan.

#### MORNING MEETING

The second paper to be presented at the meeting was given by the Rev. Harry J. Byrne, J.C.L., of New York. It dealt with the question of the investment of church funds. With a close discrimination relative to the divergent acts of administration it was shown under what controls the investment of church funds was to be undertaken. The presentation of this paper also furnished ample occasion for further discussion from the floor. The present issue of THE JURIST carries in full a reprint of this paper.

#### APPOINTMENT OF COMMITTEES

At the end of the noon luncheon the Society's newly elected President, Monsignor Edward M. Burke, reported the committee appointments of the coming year. The membership of the Committee on Promoting Regional Conferences was left unchanged. The retention of the membership of this committee was thought to serve more efficiently for the completing of the work previously initiated and in progress at the time. Accordingly, Bishop MacKenzie, Auxiliary to the Archbishop of Boston, will again be aided by the Very Rev. Alfred R. Julien, of Boston, and Timothy J. Champoux, of Springfield, Mass.

For the Committee on Research and Discussion the Very Rev. Adam C. Ellis, S.J., of St. Marys, Kansas, was appointed as chairman, with the Very Rev. Benjamin F. Farrell, J.C.D., of Wheeling, and the Rev. Thomas W. Smiddy, S.T.L., of Brooklyn, as aides. For the Committee on Membership the Rev. Clement Bastnagel was reappointed as chairman, and assigned in his aid were the Very Rev. John Gannon, of Worcester, and the Rev. Edward Gagnon, S.S., S.T.D., of Montreal. For the Committee on Arrangements the appointment was held in abeyance until some future time when a selection of the members of the Committee could be undertaken with a more practical approach to the problem.

In line with Article IX of the Society's Constitution, the President also appointed two new members to serve as consultants on the Executive Committee. The Rt. Rev. Walter Furlong of Boston and the Very Rev. John J. Król of Cleveland were to continue in office for another year, in order to hold out the two-year term to which they had been appointed a year earlier. The Rt. Rev. James P. Kelly of New York and the Rt. Rev. Romeo R. Blanchette of Joliet were appointed for a two-year term to serve as the successors of the Very Rev. John M. Costello of New York and the Rev. Charles A. Kerin, S.S., of St. John's Seminary, Plymouth, Michigan.

#### FINAL SESSION

Designed as a meeting that could prove of special interest to religious came the session in which Father Adam C. Ellis, S.J., outlined in clear detail the law as it will bind religious in the future for the making of reports to the Holy See. Many of those in attendance, though not members of any religious institute or community, were present because of the interest inherent in the topic as explained by Fr. Ellis. Fr. Ellis handled his assignment with admirable comprehensiveness and reassuring clarity, and made the discharge of his task a reward for all those who attended the session. The success that attended this added feature of the national meeting aroused the hope that a similar feature may be in store at the next annual meeting, which next fall will look to Chicago for its proper locale.

#### CALIFORNIA REGIONAL MEETING

In accord with the By-Laws of The Canon Law Society of America, a "Regional Conference of The Canon Law Society of America for the Ecclesiastical Provinces of San Francisco and Los Angeles" was established in San Francisco, California, on October 18, 1950. A Conference was held in San Francisco on October 17 and 18 and officers were chosen for the ensuing year 1950-1951.

The Conference was called by His Excellency, Most Rev. Merlin J. Guilfoyle, D.D., J.C.D., Titular Bishop of Bulla and Auxiliary Bishop of San Francisco, with the approval of His Excellency, Most Rev. John J. Mitty, D.D., Archbishop of San Francisco. Present at the Conference were canon lawyers from the Archdioceses of California and from the Dioceses of Sacramento, Salt Lake, Reno, Monterey-Fresno and Tucson. On the first day of the Conference the members attended the Annual Red Mass, sponsored by the St. Thomas More Society of Catholic Lawyers of San Francisco. This Mass was celebrated *coram Pontifice*, with His Excellency, Archbishop John J. Mitty, presiding. Bishop Guilfoyle preached the sermon. At noon the canon lawyers were guests at a luncheon, sponsored annually by the St. Thomas More Society on the day of the Red Mass.

On the second day of the Conference morning and afternoon sessions were held by the canon lawyers at the Meeting Hall of St. Vincent de Paul Parish, San Francisco, with Bishop Guilfoyle presiding. In the morning a paper was read by Rev. Nicholas P. Connolly, J.C.D., Pro-Synodal Judge of the Tribunal

of San Francisco and Vice-Chancellor of the Archdiocese of San Francisco. This paper was entitled "Christian Burial—An Outline for Chancery Office Officials". Discussion followed. At the afternoon session two subjects were discussed in Round Table Fashion. With Rev. Thomas J. Bowe, J.C.D., Pro-Synodal Judge of the Tribunal of San Francisco, leading, the subject of "Permission to Obtain Civil Divorce or Annulment" was considered. With Rev. Chester J. Thompson, J.C.D., Pro-Synodal Judge of the Tribunal of San Francisco, leading, the subject of "Frater-Soror Permissions" was considered.

The Conference concluded with a business meeting, at which the Regional Conference's Constitution and By-Laws were adopted, and at which there were elections. For the year 1950-1951, the officers will be: President, Right Reverend Michael Galvin, S.T.L., *Officialis* of the Archdiocese of Los Angeles; Vice-President, Right Reverend Daniel P. Collins, S.T.L., J.C.D., of the Tribunal of the Archdiocese of Los Angeles; Secretary, Very Reverend Anthony J. Brouwers, S.T.B., of the Tribunal of the Archdiocese of Los Angeles.

#### NORTHWEST REGIONAL MEETING

The Northwest Regional Meeting of The Canon Law Society of America was held September 15, 1950, at St. Edward's Seminary, Kenmore, Washington. Most Rev. Thomas A. Connolly, D.D., J.C.D., Bishop of Seattle, presided, and Rev. James H. Brennan, S.S., J.C.D., President of St. Edward's Seminary, acted as Chairman. The paper was entitled "The Role of the Promoter of Justice with Particular Reference to the Public Good" and was read by Very Rev. Joseph L. Wolter, J.U.D., *Officialis* of the Diocese of Seattle. Reports were made by Very Rev. Thomas J. Tobin, J.C.D., S.T.D., Vicar General of the Archdiocese of Portland (on secular legislation in the Northwest, particularly in reference to the problem of divorce), and by Rev. Thomas Brockhaus, O.S.B., J.C.D., of Mt. Angel Abbey (on recent canonical literature).

The Meeting was honored by the attendance of Most Rev. Charles D. White, D.D., Bishop of Spokane, Most Rev. Joseph Gilmore, S.T.D., Bishop of Helena, and Most Rev. Martin Johnson, Bishop of Nelson, B. C.

The highlight of the Meeting was the address delivered by the Most Rev. Apostolic Delegate to the United States.

#### THE RICCOBONO SEMINAR OF ROMAN LAW IN AMERICA

I. Date: October 27, 1950.

Author: Dr. Agustin Diaz Biale of the National University of Cordoba, Argentina. The paper was read by Dr. Franklin F. Russell.

Title: "Roman Law and *Ius Naturale*".

**II. Date: November 30, 1950.**

A participating seminar under the joint leadership of Assistant Professor William H. Roberts, J.U.D., of the School of Social Science, The Catholic University of America, and Mr. Karl K. Spriggs, LL.B., practising member of the Bar of the District of Columbia.

Title: "Comparative Law", a study of the comparative approach to case law based on Chapter VII of "Comparative Law", by H. C. Gutteridge (Cambridge University Press, 1946).

**III. Date: December 19, 1950.**

Author: William H. Roberts, J.U.D.

Title: "The Corporation in Comparative Law".

Abstract: The paper reviewed the trends directed towards the preservation of the corporate entity in opposition to attempts to pierce the corporate veil during the period dating from just before World War I and ending with the cessation of hostilities of World War II. There followed a comparative analysis of recent legislation, of judicial decisions, and of treaties in their bearing on corporate problems.

**THE CONCILIUM (1950-1951)**

Adolf Berger, J.U.D., Professor at the Ecole Libre des Hautes Etudes, New York, N. Y., Magister.

William H. Roberts, J.U.D., Asst. Professor of International Law, The Catholic University of America, Scriba.

Brendan F. Brown, D.Phil. (Oxon), LL.M., J.U.D., Dean, School of Law, The Catholic University of America, ex officio.

Rev. Felix A. Wilches, O.F.M., J.U.D., Lecturer in Roman Law, The Catholic University of America, ex officio.

Roscoe J. C. Dorsey, LL.M., D.C.L., former Professor at the Washington College of Law.

Stephan Kuttner, J.U.D., Professor of the History of Canon Law, The Catholic University of America.

